UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 07-14094-CIV-MOORE/Lynch

KAREN L. ALTON, FAITH D. ROSE
SUSAN DICANIO, STEPHANIE D. MEANS,
DANYELL HOSNER, HALEIGH LINKUS,
WANDA DAVIS, CRYSTAL SANDERS and
GWEN WELSH-FRITZ,

Plaintiffs/Counterclaim Defendants,
v.

LIBERTY MEDICAL SUPPLY, INC.,
a Florida Corporation, and LIBERTY
HEALTHCARE GROUP, INC.,
a Delaware corporation, AGNES BRADY and
PAULA RICHMOND

Defendants/Counterclaim Plaintiffs.
_____/

**PLAINTIFFS' OBJECTION TO REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR APPROVAL OF SUPERSEDEAS BOND AND STAY OF EXECUTION – DOCKET ENTRY 113**

COME NOW, the Plaintiffs, by and through undersigned counsel and hereby object to the Report and Recommendation on Defendants' Motion for Approval of Supersedeas Bond and Stay of Execution, 4/21/08 DE 113 (hereinafter "R&R Approval of Bond 113") and in support thereof state as follows:

The Magistrate has opted to disregard long settled Federal and applicable State law in making his ruling. There is clear error of law which should provide the basis for the Court to decline to accept the Report and Recommendation. Though it is true that the Court might arrive, in its discretion, at the same practical resolution as that proposed by the Magistrate, the Magistrate is incorrect in his use of applicable law. The Magistrate's opinion, if followed, may

have consequences for others seeking relief on judgments and has a potential collateral financial consequence for the Plaintiffs.

The Defendants had every opportunity to motion this Court pursuant to Fed.R.Civ.P. 62(h) - Stay with Multiple Claims or Parties and they absolutely failed to do so. Rule 62(h) is the federal procedure in place that could have been utilized by the Defendants if they has chosen to stay the damages final judgment pending the outcome of the attorneys fees issue.

The instant Report and Recommendation ("R&R Approval of Bond 113") is in direct contrast with the still pending Report and Recommendation on Defendants' Emergency Motion to Dissolve Writs of Garnishment in the Ealy-Simon v. Liberty Medical Supply, Inc. and Jochem v. Polymedica cases (hereinafter "R&R Dissolve Writs Ealy-Simon 784 and Jochem 211") which ruled that the garnishment proceeding instituted by the Plaintiffs was not premature and that no legal authority was cited which precluded the Plaintiffs from executing on the damages award and that "Shelton was not on point". It also conflicts with the still pending Report and Recommendation on Defendants' Emergency Motion to Release Excess Garnished Funds, 3/26/08 DE 788 in Ealy-Simon (hereinafter "R&R Emergency Release Ealy-Simon 788") in which Magistrate Lynch denied the release of any excess funds currently garnished and ruled that Mr. Farrell and Mr. Trowbridge "remain subject to the underlying damages judgment and remain subject to post-judgment proceedings" (R&R Emergency Release Ealy-Simon 788, p. 2)

Plaintiffs specifically object to the following portions of R&R Approval of Bond 113:

> 1. "The case's procedural posture is similar to that of Ealy-Simon where garnishment of the damages award occurred before the entry of the attorney fee and cost award. This approach, as this Court discusses in greater detail at DE 803 in the Ealy-Simon case, Case No. 05-14059-CIV-MOORE/LYNCH, effectively denies the Defendant the opportunity to seek a stay on the judgment's execution." (R&R Approval of Bond 113, para. 3, pg. 2)
>
> 2. "The cases cited by Plaintiffs are easily distinguishable. [citations omitted], the defendants posted their bonds to stay execution well after the

expiration of the automatic stay and other prerequisites. The same cannot be said of the present course of events." (R&R Approval of Bond 113, para. 4, pg. 2)

3. With respect to discussion of the case of Moses v. K-Mart Corp., 922 F. Supp. 600 (S.D. Fla. 1996) the Plaintiffs object to:

> a. "The key distinguishing factor between Moses and the instant case is one of timing. In Moses, the defendant waited well after the automatic stay and after the plaintiff legitimately had commenced execution. In the instant case, by contrast, the attempted execution was premature, and there is no need for Defendants' bond to have any retroactive effect in order to stay execution completely." (R&R Approval of Bond 113, para. 5, pg. 2-3)

4. "The Plaintiffs' approach has the additional effect of denying the Defendants the benefit of a stay." (R&R Approval of Bond 113, para. 6, pg. 3)

5. "In short, the Plaintiffs' attempted garnishment on the damages final judgment was premature." (R&R Approval of Bond 113, para. 7, pg. 3)

6. "Accordingly, this Court recommends to the District Court that the Defendants' Motion for Approval of Supersedeas Bond and Stay of Execution be **GRANTED**." (R&R Approval of Bond 113, pg. 4)

7. "This Court recommends further that the Writs of Garnishment be **DISSOLVED** in light of the posted security." (R&R Approval of Bond 113, pg. 4)

**Timeline Governing the Instant Circumstances**

| | |
|---|---|
| 2/20/08 | Final Judgment as to FLSA Damages (DE 95) |
| 3/6/08 | Writs of Garnishment issued on the damage final judgments in in the Ealy-Simon & Jochem cases. **(Liberty Defendants are on notice that the garnishment proceedings are occurring on the damage final judgments in other Liberty cases.)** |
| 3/5/08 | 10-day automatic stay period ends for damages Final Judgment |
| 3/11/08 | Final Judgment as to FLSA Damages recorded in O.R. Book 2947, Pg. 2782 - 2784, St. Lucie County, Florida |
| 3/21/08 | Report and Recommendation Denying Motion to Dissolve |

Writs of Garnishment in Jochem (DE 211) and Ealy-Simon (DE 784)
**(Plaintiffs in the instant action are put on notice that the garnishment proceedings are not premature and may proceed as a matter of right)**

3/26/08 Report and Recommendation denying release of excess funds issued Ealy-Simon (DE 788)
**(Continuing confirmation to the Plaintiffs in the instant action that garnishment proceedings are not premature and may proceed as a matter of right)**

3/28/08 Writ of Garnishment issued in this case

4/2/08 Motion for Stay and Supercedeas Bond filed by Defendants (DE 103)

5/6/08 Report and Recommendation re: Attorney Fees and Costs (DE 114)

**Southern District of Florida Procedures with Respect to Execution of Judgments**

Pursuant to United States District Court, Southern District of Florida, General Civil Case Filing Requirement, Revised July 3, 2007, the procedure for the issuance of a writ of garnishment is as follows:

> **M) Writ of Garnishment**
>
> The issuance of Writs of Garnishment by a federal district court is controlled by the law of the state in which the district court is located. Under Florida law, post judgment Writs of Garnishment can be issued only after the judgment creditor files a motion. (Fed. R. Civ. P. 64.)
>
> A Writ of Garnishment is an order directing a third party to turn over property held for a debtor to a specified creditor for the purpose of satisfying a judgment.
>
> The following documents are required:
>
> • Motion to Issue Writ of Garnishment stating the amount of a judgment and that the movant does not believe the defendant is in possession of visible property on which a levy can be made sufficient to satisfy the judgment. (Fla. Stat. 77.03 [2003].) The latter establishes "good cause" for issuance of the writ.
>
> • An original, signed Writ of Garnishment setting forth the amount of the judgment and the names of the parties against which a judgment has been entered. Prepare an original, signed motion and an original, signed proposed Writ of Garnishment and five copies to include one original, one for the

> Court's financial records, one to serve on the party, *and* one to be returned to the Clerk's Office to document the Return of Service.
>
> The Deputy Clerk will research the case to confirm that the writ complies with the judgment and that:
>
> • The judgment is final (*i.e.*, that 10 days have passed from the date the judgment was entered on the docket).
>
> • *If* the judgment is currently on appeal *and* bond has not been posted, that 30 days have passed since the date the judgment was entered on the docket. (If 30 days have not passed since the judgment was entered, the writ cannot be issued.)
>
> • A supersedeas bond has *not* been posted.
>
> • There is *no* pending motion that would preclude the issuance of the writ (*i.e.*, motion for a new trial).
>
> • The amount stated in the motion and in the writ does not exceed the amount of the judgment.
>
> The Deputy Clerk will sign, date, and seal three writs and return two of the issued writs to the filing party.
>
> There is no filing fee; however, a $100.00 deposit into the Court Registry is required when the Writ is issued. (Florida Statute 77.28 and AO - 90-104 & 98-51.)

No caveat or limitation exists with respect to the above procedures which precludes the issuance of a writ of garnishment on a damages final judgment in an FLSA, Title VII or any other mandatory attorney fee case. There is nothing which notifies the Clerk of Court that the ten day automatic stay found in Fed.R.Civ.P. 62(a) does not apply to mandatory attorney fee cases as in the instant case. There is nothing in the procedures which would alert the Plaintiffs in this case that the issuance of a writ on the damages final judgment was premature or not allowed. Certainly if the writ was issued in error it would be the error of the Clerk and not the Plaintiffs. The Plaintiffs followed the procedures to a "t", the Clerk reviewed the docket sheet, verified that all conditions precedent were met and issued the Writs.

The Judgment as to FLSA Damages, DE 95 was clear on its face, that it was a) a Judgment and b) it contained the ruling that "This Judgment is effective on the date entered below, shall bear interest at the legal rate, and is subject to all parties' rights of appeal." The date of the Judgment as to FLSA Damages was 2/20/08.

The District Court had previously addressed the "finality" of damage award final judgments in the Ealy-Simon action when upon motion by the Plaintiffs for entry of the Final Judgment, the Defendants filed a response to same (Ealy-Simon DE 750) in which they argued that the word "final" should not appear in the judgment because the judgment was not really final. The Court rejected their argument and entered an "Order of Final Judgment" (Ealy-Simon DE 752) pursuant to the Plaintiffs' motion for same. In the instant matter, the Defendants drafted the Judgment to be entered and opted to not include the word "final" in the title. However, a dog by any other name is still a dog and the judgment with respect to damages in this matter is a final and executable judgment and began to bear interest on the date it was entered.

**Florida Law Regarding Execution of Judgments**

The Plaintiffs moved the Court and had the Writs issued pursuant to Fla. Stat. 77.03 – Issuance of Writs after judgment. There is no question the Final Judgment as to FLSA Damages was entered in the record (DE 95) and that 10 days had passed prior to the Plaintiff's request for the issuance of the Writ.

Florida Statute 77.01 Right to writ of garnishment provides:

> Every person or entity who has sued to recover a debt or has recovered judgment in any court against any person or entity has a right to a writ of garnishment, in the manner hereinafter provided, to subject any debt due to defendant by a third person or any debt not evidenced by a negotiable instrument that will become due absolutely through the passage of time only to the defendant by a third person, and any tangible or intangible personal property of defendant in the possession or control of a third person. The officers, agents, and employees of any companies or corporations are third persons in regard to the companies or corporations, and as such are subject to

garnishment after judgment against the companies or corporations.

The procedure for having the Writs issued was precisely followed by the Plaintiffs as contemplated by Florida Statutes Chapter 77, et. seq. and the United States District Court ,Southern District of Florida, General Civil Case Filing Requirement, Revised July 3, 2007. In the R&R Dissolve Writs Ealy-Simon 784 and Jochem 211, Magistrate Lynch ruled "The Defendants cite no legal authority that precludes the Plaintiffs from executing on the damages award, and Shelton is not on point. In short, the Defendants identify no impediment to the garnishment proceedings going forth pursuant to the requirements and procedures of Chapter 77, Fla. Stats." (R&R Dissolve Writs Ealy-Simon 784 and Jochem 211). Objections, responses and replies have been filed to these Reports and Recommendations but no ruling has yet been made by the District Court Judge.

In the most recent Report and Recommendation (DE 113), Magistrate Lynch completely changes his previous ruling and states that the Plaintiffs' execution was premature. The Magistrate takes a position in direct conflict with his earlier correct ruling which is contrary to Florida and Federal law. The Defendants cited no law not already considered by Magistrate Lynch with respect to the legitimately commenced execution and Magistrate Lynch does not cite any law which supports the finding that the writs which he deemed were legitimately issued on March 21, 2008 (R&R Dissolve Writs Ealy-Simon 784 and Jochem 211) are now not legitimate and are premature.

The factual timeline of the instant case is not identical to the Ealy-Simon or Jochem cases with respect to the issuance of the Writ of Garnishment. In the instant case the Plaintiffs did not seek to have a Writ issued until *after* this Court ruled on March 21, 2008 in Ealy-Simon and Jochem that there was no impediment with the Plaintiffs going forth with the garnishment proceedings under Fla. Statute § 77 et seq. (R&R Dissolve Writs Ealy-Simon 784 and Jochem

211) The Plaintiffs (or undersigned counsel) in the instant action cannot be faulted with any so called premature issuance of the Writ as the Court's previous rulings opined that the garnishment proceedings were not premature and were properly proceeding according to Florida Statute. The Writ of Garnishment in the instant case was not issued until 7 days after the Court ruled in the sister litigation that there was no impediment to going forth with execution of the damage final judgments.

**Arguments with Respect to Specific Portions of the Report and Recommendation**

**1. "The case's procedural posture is similar to that of Ealy-Simon where garnishment of the damages award occurred before the entry of the attorney fee and cost award. This approach, as this Court discusses in greater detail at DE 803 in the Ealy-Simon case, Case No. 05-14059-CIV-MOORE/LYNCH, effectively denies the Defendant the opportunity to seek a stay on the judgment's execution." (R&R Approval of Bond 113, para. 3, pg. 2)**

The automatic stay period for the Final Judgment as to FLSA Damages ran on 3/5/08 (10 days from the date of entry 2/20/08). It is not the position of the Plaintiffs in this case that the ruling in Shelton v. Ervin, 830 F.2d 182 (11th Cir. 1987) in any way shape or form governs the executable nature of a Judgment for FLSA Damages.

The Defendants were provided more than ample time to secure a bond or motion the court for a stay of execution of the Judgment as to FLSA Damages. Rule 62(a) provides the necessary time for Defendants to obtain a bond – ten days.

The securing of bonds or motions to stay damage final judgments in FLSA actions is common practice in the 11th Circuit and the Southern District and this securing of bonds or stays occurs *before* any resolution of the mandatory attorney fee and costs issues. See Moses v. Kmart, 922 F.Supp. 600, (S.D. Fla. 1996)("…more than three months passed since the [automatic] stay of execution expired. K-Mart's assets had been available to Plaintiffs as

satisfaction for the judgment since the middle of November 1995, yet remarkably, no action had been taken to seize those assets or otherwise stay execution of the judgment.") In comparison, note the FLSA action Rodriguez, et al. v. Farm Stores Grocery, United States District Court, Southern District, Case No. 02-cv-11351-DMM. In the Rodriguez case, Plaintiffs prevailed at trial and Final Judgment for wages in the amount of $305,188.00 was entered in the docket on 2/17/05 (DE 239). On 3/18/05, after Defendants' post-trial motions were denied, the Defendants filed a Motion with Memorandum for Stay of Execution of Final Judgment (DE 264). The stay was granted and Defendants filed a bond. The Plaintiffs' motions for attorney fees and liquidated damages were not yet final. On 6/9/05, Final Judgment as to attorney fees was entered (DE 304). The Final Judgment as to attorney fees contemplated that the Defendants would file a second bond to stay the execution of the attorney fee final judgment. Such a bond was ultimately posted. Approximately one year later on 5/26/06, Final Judgment on Liquidated Damages was entered (DE 361) and the Order granting stay of execution on this third Final Judgment in the case was entered on 6/12/06. Stays of execution were requested and bonds were posted by the Defendants for *all three Final Judgments* in this case.

See also the FLSA collective action Morgan v. Family Dollar Stores, Inc., United States District Court, Northern District of Alabama, Case No. 7:01-cv-0303-UWC, Final Judgment as to FLSA Damages was entered on 3/31/06 (DE 592). After that date several motions to alter that judgment were entered in the record. The Motion for Attorneys Fees was filed 4/14/06 (DE 656) and that motion was stayed by the Court on 4/25/06. Defendant Family Dollar Stores filed its motion to stay execution and post bond with regard to the damages award on 4/19/06 and the bond was ultimately posted on 4/19/06 (DE 663) *one year prior to the Amended Final Judgment as to FLSA Damages* which was entered on 4/16/07 (DE 708) and long before the resolution of the attorney fee and cost issue. The Notice of Appeal was not filed until 5/11/07 (DE 713). In

the Family Dollar Stores, Inc. case, the Defendants sought and obtained a stay of execution on an FLSA damages award one year prior to filing the Notice of Appeal.

At no time in any of the three mandatory attorney fee, two of which are FLSA cases, described above did the Courts rule or find that the damage final judgment were not executable. In fact, the exact opposite was found in that the Courts allowed the posting of bonds to stay the execution of the damage final judgments long before the issue of attorney fees was resolved. All three of the above described cases were ruled on after Shelton v. Ervin, supra became effective in 1987.

The Defendants in the instant case were on full notice that garnishments were proceeding with respect to the damage final judgments in sister litigation and they failed to motion this Court for a stay or the filing of a bond to stay the execution of damages final judgment until *after* the Writ of Garnishment was issued. The Defendants were also fully aware as early as 3/21/08 that this Court ruled that there was no impediment to the Plaintiffs in the sister litigation with respect to going forth with the execution garnishment. Still they failed to petition this Court for relief from execution until *after* the Writ in this case was issued. Any matter of timing in the instant action is to be faulted against the Defendants for their clear failure to secure the judgment.

> **2. "The cases cited by Plaintiffs are easily distinguishable. [citations omitted], the defendants posted their bonds to stay execution well after the expiration of the automatic stay and other prerequisites. The same cannot be said of the present course of events." (R&R Approval of Bond 113, para. 4, pg. 2-3)**

The cases cited by the Plaintiffs *are not* easily distinguishable for the fact or reason cited by Magistrate Lynch. In the U.S. V. $2,490.00, 825 F.2d 1419 (9th Cir. 1987), Ribbens Intern, S.A. de C.V. v. Transport Intern. Pool, Inc., 40 F. Supp 2d 1141 (C.D. Cal. 1999), Johns v. Rozet, 826 F.Supp. 565 (D.D.C. 1993) cases, as in the instant action the Defendants posted their bond well after the automatic stay. In the instant action, the Defendants posted their bond on

4/10/08 – 3½ months after the automatic stay period expired on 12/15/07. As with the cases cited by the Plaintiffs, all of those Defendants likewise posted their bonds well after the automatic stay. Magistrate Lynch does not rule with any words that Fed.R.Civ.P. 62(a) is not applicable to the Final Judgment as to FLSA Damages, but the outcome of his ruling seems based on that premise. The premise that no automatic stay period exists for a damages judgment in an FLSA (or any other mandatory attorney fee case) is contrary to law and the rule. There is nothing in Fed.R.Civ.P. 62(a) which sets forth that some types of final judgments are governed by this rule and others (damage judgments in FLSA actions) are not governed by the rule. Magistrate Lynch alludes to "other prerequisites", but the undersigned does not know what is being referred to as no such prerequisites are set forth in the Report. The only "other prerequisites" known to the Plaintiffs regarding executions and garnishments are outlined in either Fed.R.Civ.P. 62, Fed.R.Civ.P. 64, Florida Stat. § 77 et seq. or the United States District Court, Southern District of Florida, General Civil Case Filing Requirement, Revised July 3, 2007. The Plaintiffs followed all of the prerequisites outlined in these rules and statutes. Judge Lynch has not ruled in any of his Reports that the procedures and prerequisites were not followed by the Plaintiffs. He has in fact, ruled emphatically, that the procedures were been followed. (R&R Dissolve Writs 211)

3. With respect to discussion of the case of Moses v. K-Mart Corp., 922 F. Supp. 600 (S.D. Fla. 1996) the Plaintiffs object to:

> **a. "The key distinguishing factor between Moses and the instant case is one of timing. In Moses, the defendant waited well after the automatic stay and after the plaintiff legitimately had commenced execution. In the instant case, by contrast, the attempted execution was premature, and there is no need for Defendants' bond to have any retroactive effect in order to stay execution completely." (R&R Approval of Bond 113, para. 4, pg. 3)**

The issue of timing is not distinguishable from Moses in the instant case. In fact, the

instant case and Moses are almost identical with respect to timing. In both cases the Plaintiffs executed on the final damage judgments several months after the judgments were entered:

| Moses v. Kmart | Alton |
|---|---|
| 10/31/95 - Final Judgment on Damages | 2/20/08 - Final Judgment (Damages) |
| 1/31/96 – 1st Writ of Execution issued | 3/28/08– Writ of Execution issued |

The 10-day automatic stay period under Fed.R. Civ. P. 62(a) expired on 11/11/95 for the Moses Plaintiffs and on 3/11/08 for the Allen Final Judgment. On 11/13/95 the Moses Defendants filed a Motion for Judgment After Trial, or for New Trial (DE 363), however, there is no indication in the Moses record that the Defendants motioned the Court under Fed.R.Civ.P. 62(b)[1] for a Stay on the Motion for New Trial or Judgment. Nor is there any indication in the Moses record that the Court *sua sponte* stayed the execution of the judgment during the pendancy of the Motion for New Trial. As result of the Defendants' failure to motion the Court for a stay under Fed.R.Civ.P. 62(b), there was no stay on the execution of the judgment during the pendancy of the Motion for New Trial and the Moses Plaintiffs were free to execute on the damages judgment at any time after the 10 day automatic stay period. Because the Moses Defendants filed a Motion for New Trial under Fed.R.Civ.P. 59, the time for **appeal** pursuant to Fed.R.App.P. 4(a)(4)(a)(v) would not run until 30 days after the entry of order disposing of the Rule 59 Motion.

In the Moses case, the time for appeal did not run until 2/6/96, 30 days after 1/5/06, the date Order Denying Motion for New Trial DE 380 was entered. The Plaintiffs in the Moses case filed their Writ of Execution DE 392 on 1/31/96, 76 days *after* the 10-day automatic stay period.

[1] "In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for new trial….." Fed.R.Civ.P. 62(b)

In the instant action, the time for appeal does not run until sometime after the attorneys fee issue is finally decided (The Report and Recommendation on Attorney Fees and Costs DE 113 was issued on 5/6/08). The Plaintiffs filed their Writ of Execution on 3/28/08, 23 days *after* the 10-day automatic stay.

The timing and course of events in both Moses and the instant case are indistinguishable. There is no issue of timing which would render it appropriate for the execution of judgment in one case and inappropriate for the execution of judgment in the other case.

The appealability situation in this case and the Moses case is analogous to the situation posed by 11th Circuit's ruling in Shelton with respect to appealability of judgments. In Shelton, an appeal in a mandatory attorney fee case cannot be taken until both the damage award and the attorney fee issues are final. Under Fed.R.Civ.P. 59, an appeal from a damage final judgment cannot be taken until the disposition of any Rule 59 motions which may be filed. However, Fed.R.Civ.P. 59 *does not* limit or stay the execution of a damage final judgment during the pendancy of the Rule 59 motion. In fact, in order for a Defendant to stay execution of a damage final judgment he must motion the Court for a stay of execution and the Court **"may"**, in its discretion and on such condition for the security of the adverse party, stay the execution of or any proceedings to enforce judgment pending the disposition of a motion for new trial. Likewise, the Shelton case *does not* stand for the proposition that a damage final judgment is not executable and Magistrate Lynch has so ruled. The Shelton case is not on point with respect to the execution of judgments. It does not speak to the issue of execution in any manner. Reliance on Shelton by the Defendants (or this Court) with respect to the execution of a judgment is misplaced and contrary to settled judgment execution law. The idea that a Judgment for damages in an FLSA case is not executable does not comport with any known rule, law or statute. The Supreme Court in Peacock v. Thomas, 516 U.S. 349, 116 S.Ct. 862, 133 L.Ed.2d

817, FN7 (1996) states: "Rule 69(a), for instance, permits judgment creditors to use any execution method consistent with the practice and procedure of the State in which the district court sits. Rule 62(a) further protects judgment creditors by permitting execution on a judgment at any time more than 10 days after the judgment is entered."

The undersigned has searched and found no case law (and none has been cited by the Defendants or Magisrate Lynch) which indicates a Final Judgment as to FLSA Damages is not executable in the State of Florida until sometime after the attorneys fee issue is finalized. As indicated above, the only time constraint found with respect to the issuance of a Writ of Garnishment after judgment is the 10 day rule found in Fed.R.Civ.P. 62(a) and the United States District Court, Southern District of Florida's General Civil Case Filing Requirements, Revised July 3, 2007. [The Deputy Clerk will research the case to confirm that the writ complies with the judgment and that: • The judgment is final (*i.e.*, that 10 days have passed from the date the judgment was entered on the docket)].

**4. "The Plaintiffs' approach has the additional effect of denying the Defendants the benefit of a stay." (R&R Approval of Bond 113, para. 6, pg. 3)**

As discussed in section 1. above, the Defendants were never denied the opportunity to request a stay or post a bond to stay the execution of the damages final judgment. Such stays and bonds are routinely granted and posted. . See Fed.R.Civ.P. 62(h) "A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments…" The fact remains that the Defendants never sought to stay the execution of the damage final judgment and allowed the judgment sit out there unprotected even after they were on full notice that the Plaintiffs in the sister litigation were seeking Writs of Garnishment on the damage final judgments. The Plaintiffs, following the exact rules for garnishment in the State of Florida, sought to execute on the judgment and this Court ruled in the Ealy-Simon and Jochem

cases that nothing prevented them from so doing. "In short, the Defendants identify no impediment to the garnishment proceedings going forth pursuant to the requirements and procedures of Chapter 77, Fla. Stat." R&R Dissolve Writs Ealy-Simon 784 and Jochem 211

**5. "In short, the Plaintiffs' attempted garnishment on the damages final judgment was premature." (R&R Approval of Bond 113, para. 7, pg. 3)**

Magistrate Lynch correctly ruled in the sister litigation there was no impediment to the Plaintiffs going forth with the garnishment proceedings in that Shelton spoke to the timing of appeals and was not on point with respect to executions of judgments. The Defendants never cited any other case which supports the proposition that the garnishment was premature because no cases exist. Magistrate Lynch may very well have decided to allow the retroactivity of the bond to take effect, however, this decision is completely separate as to the validity of the execution proceedings. By stating that the garnishment proceedings were premature, this Court is ruling that the Fed.R.Civ.P. 62(a) **does not** apply to mandatory attorney fee cases and for those such cases a longer automatic stay period applies. The Court has not however, indicated what that new stay period is. Is it an automatic 30 day stay period for mandatory attorney fee cases? Is the judgment automatically stayed until after the attorney fees issues are fully decided? In this case the attorney fees issue spanned 95 days from start to finish. Is the Court suggesting that Fed.R.Civ.P. 62(a) does not apply to the instant case and the stay period for all mandatory attorney fee cases is to be decided by the Court and not governed by the Rules. This ruling will not affect these Plaintiffs and Defendants only. It will become the law of the Southern District that garnishment proceedings cannot be commenced on any damage final judgments in any mandatory attorney fee case until sometime after the attorney fee issue is fully briefed and ruled upon.

It must also be considered that the Judgment as to FLSA Damages clearly contemplates

that the "This Judgment is effective on the date entered below, shall bear interest at the legal rate, and is subject to all parties' rights of appeal." Is it the Court's opinion now that the Judgment is not in fact final and interest does not begin to accumulate with the date of the Judgment ? Neither the Defendant nor Magistrate Lynch has cited any case law or precedent which renders the damages final judgment non final. The Defendants argue in their recently filed Response to Plaintiffs' Objection to Report and Recommendation in the Ealy-Simon case that a damages final judgment is not final and is just an interlocutory order that is non-binding. That posture is absolutely inconceivable to the Plaintiffs there and the Plaintiffs here.

Defendants wrongly suggest that if the issue of attorneys fees is still outstanding the judgment on damages cannot be final and executable. However, the filing of a motion for attorney fees under Rule 54(d)(2) does not ordinarily affect the finality of the underlying judgment. Moody Nat'l Bank of Galveston v. GE Life & Annuity Assurance Co., 383 F.3d 249 (5th Cir. 2004). Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2). Fed.R.Civ.P. Rule 58(c)(1). In the instant action, there will be two final judgments, one for the Plaintiff's damages and one for attorneys fees and costs. Both judgments are executable after 10 days of their entry if a bond is not posted. *See also* Bendix Aviation Corp. v. Glass, 195 F.2d 267 (3rd Cir. 1952) which stands for the proposition that a judgment may be entered on a single claim of a multiple claim action (prior to the other claims being fully adjudicated) and the judgment of that single claim is to be regarded as just as final as though the claim were the sole claim for relief embodied in a wholly independent action; when such a judgment has been entered it may at once be enforced and executed, unless enforcement is stayed by the Court.

There is no legal support in the record and none has been cited by Magistrate Lynch or the Defendants with respect to the premature or improper nature of the execution proceedings

taking place under Fla. Sta. § 77 et seq. The execution of judgments is governed by laws of the State in which the judgment was entered. The Plaintiffs explicitly followed the writ of garnishment procedures as they are outlined by Fla. Stat. § 77 et seq. Not one ruling has been made by this Court, nor any allegation made by the Defendants that the statutory procedures have not been followed.

The implications of this ruling reach far and wide. By its "premature" ruling the Court is changing the governing Florida law which clearly allows for the execution of the judgment. If the "premature" ruling stands are the Plaintiffs now responsible for the attorney fees of the garnishor Bank of America? The Plaintiffs were required to deposit $100.00 in the Court registry for the issued Writ. Under Fla. Stat. § 77.28, Bank of America may request the additional attorney fees. Fla. Stat. § 77.28 states in part:

> Plaintiff may recover in this manner the sum advanced by plaintiff and paid into registry of court, and if the amount allowed by the court is greater than the amount of the deposit, together with any offset, judgment for the garnishee shall be entered against the party against whom the costs are taxed for the deficiency.

By this unsupported "premature" ruling, is the Court also going to find that the Plaintiffs are responsible for the garnishee's attorney fees? That prospect is quite daunting considering there is not a scintilla of evidence in the record that the Plaintiffs did not follow all the procedures of Fla. Stat. § 77 et seq. Accordingly, Plaintiffs objects to such a finding which may subject them needlessly to an award of attorneys fees.

**6. "Accordingly, this Court recommends to the District Court that the Defendants' Motion for Approval of Supersedeas Bond and Stay of Execution be GRANTED." (R&R Approval of Bond 113, pg. 4)**

At the core, the most important issue for the Plaintiffs is the security of the final judgment damage amount. This security has been accomplished by the garnishment of the monies sufficient to cover the damage final judgment. This Court however, may find that the

supersedeas bond for these damages is a more sufficient security and may rule to allow the retroactivity of the posted bond to cover the garnished funds and subsequently allow the writ to be dissolved as Magistate Lynch ruled below "in light of the posted security". The Court is free to make this decision. The Plaintiffs know the Circuits are split with respect to the retroactivity of bond posting[2]. The 11th Circuit has upheld Moses v. K-Mart, *supra* which did not allow the retroactivity of the posted bond to affect the monies already garnished, however no other 11th Circuit Court of Appeals case has been found with respect to the application of retroactive bonds.

If this Court decides to allow the retroactive bond to serve as security, it prays this Court bases its decision to dissolve the Writs of garnishment based on that premise and not the premise that the garnishments were faulty or premature.

**7. "This Court recommends further that the Writs of Garnishment be DISSOLVED in light of the posted security." (R&R Approval of Bond 113, pg. 4)**

Although the whole of Magistrate Lynch's Report and Recommendation relies on the premise that the Writ was prematurely issued, his final decision is that the Writ be dissolved "in light of the posted security". This ruling speaks to the issue of retroactivity of the bond and not the impropriety of the garnishment proceedings. Should this Court uphold the ruling and dissolve the Writ, Plaintiff requests this court find the dissolution of same is based on the posted security and not on the premise of fault of any kind by the Plaintiffs. This Court should further find that the Defendants are liable for the garnishee's and Plaintiffs' attorney fees and costs associated with the issuance of Writ.

As a final note, this Court cannot dissolve the Writ of Garnishment without a formal hearing. Fla. Stat. § 77.07. See Murphy v. Murphy, 912 So.2d 353 (3rd DCA) "("wife"), appeals

[2] The Florida Supreme Court has long ago addressed this very issue and determined that a late filed bond and stay request shall have no effect on prior executions on the judgment. Thalheim v. Camp Phosphate Co., 48 Fla. 190, 37 So. 523, 525 (1904); Bacon v. Green, 36 Fla. 313, 18 So. 866, 869 (1894). This well settled law has not changed in over 100 years.

the trial court's adverse order granting William Murphy's ("husband"), emergency motion for release of funds. Because the trial court entered its order without conducting a hearing on the husband's exceptions, we reverse." Fla. R. Civ. P. 1.490(h); Lehrman v. Vondra, 786 So.2d 673 (Fla. 3d DCA 2001); Scott v. Scott, 667 So.2d 975 (Fla. 4th DCA 1996); Berkheimer v. Berkheimer, 466 So.2d 1219 (Fla. 4th DCA 1985). Accordingly, we reverse and remand for the trial court to conduct a full hearing on the husband's exceptions." In the instant matter the Defendants have requested this Court dissolve the Writ which Magistrate Lynch has ruled were legitimately issued (R&R Dissolve Writs Ealy-Simon 784 and Jochem 211) and then subsequently ruled were premature (Report and Recommendation (DE 113). Plaintiffs respectfully request a full hearing be held with respect to the dissolution of the Writ.

WHEREFORE, the Plaintiffs pray this Court deny the Report and Recommendation and enter an Order upholding the validity of the issued Writ of Garnishment or in the alternative grant the motion for bond and stay based on the retroactivity of the posted security and not on the basis that the Writs were issued prematurely. Plaintiff further asks this Court to set a hearing so that the issue of dissolution of the Writ can be accomplished pursuant to Florida law.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Haas A. Hatic, Esq., Greenspoon Marder, P.A., Trade Centre South - Suite 700, 100 W. Cypress Creek Road, Fort Lauderdale, Florida 33309 and David Barmak, Esq., Mintz, Levin, Cohn, et al., 701 Pennsylvania Avenue, N.W., Washington, DC 20004, this 7th day of May, 2008.

/s/ Mark A. Cullen

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