

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

WILLIAM D. SUTHERLAND	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION No. 1:07cv557 JCC/TCB
	)	
SOSi INTERNATIONAL, LTD., et al.	)	
Defendants.	)	

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MEMORANDUM IN SUPPORT OF PLAINTIFF’S OPPOSITION TO THE MOTION  
TO DISMISS

Plaintiff William D. Sutherland (“Mr. Sutherland”) hereby opposes the Defendants’ Motion to Dismiss, and in support states as follows.

BACKGROUND

This is an action brought under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §201 et seq., and the Uniformed Services Reemployment Rights Act (“USERRA”) 38 U.S.C. § 4301, et. seq. by Mr. Sutherland against Defendants SOSi International, Ltd. (“SOSi”), and Julian Setian (“Mr. Setian”). The Complaint was filed with the Court on June 8, 2007. (Dkt. 1).

Plaintiff alleged that Defendants failed to compensate him at a rate of time and a half his normal rate of pay for all hours over forty worked in a work week. *Id.*, ¶ 16, 23. Plaintiff further alleged that Defendants required to him to work uncompensated overtime hours and/or that the Defendants “suffered or permitted” him to work uncompensated overtime hours. *Id.*, ¶ 14, 21.

Defendants filed a Motion to Dismiss on July 10, 2007. (Dkt. 7). With regards to the FLSA claim, Defendants argued that because Mr. Sutherland did not allege that he was a non-exempt employee, his Complaint fails to state a claim. What Defendants fail to realize, however, is that exemptions to the minimum wage and overtime requirements of the FLSA are affirmative

defenses. Not only is Mr. Sutherland not required to negate any potential affirmative defenses in his Complaint, but the burden of proving such an affirmative rests with the Defendants. For the reasons stated herein, Defendants' Motion to Dismiss should be denied.

## ARGUMENT

### I. BECAUSE AN FLSA EXEMPTION IS AN AFFIRMATIVE DEFENSE, A PLAINTIFF IS NOT REQUIRED TO NEGATE THE POSSIBLE APPLICATION OF AN FLSA EXEMPTION IN HIS OR HER COMPLAINT.

Defendants argue that the Complaint should be dismissed because Mr. Sutherland did not allege that he was non-exempt and entitled to overtime compensation under the FLSA. Dkt. 7, pg. 2-3. Defendants also state that Plaintiff "failed to allege and facts in his Complaint that demonstrate that he was a non-exempt employee." *Id.*, pg. 3. This argument is contraindicated by more than a half-century of clearly established precedent that an employee does not need to negate every possible FLSA exemption that could conceivably apply.

To state a cause of action under the FLSA, a plaintiff is not required to allege that the Act's exemptions are inapplicable. *See Schmidke v. Conesa*, 141 F.2d 634 (1st Cir.1944). In FLSA litigation, the Defendant employer has the burden of pleading and proving a statutory exemption. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197 (1974) ("the general rule [is] that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof.") *See also, Clyde v. Broderick*, 144 F.2d 348, 349-51 (10th Cir.1944) (in action under FLSA to recover overtime wages, pleader is not required to do more than make a "short and plain statement" of facts upon which he relies to establish his claim that he and his fellow employees were engaged in commerce or in production of goods for commerce within the Act).

The Court in *Stratton v. Farmer's Produce Co.*, 134 F.2d 825 (8th Cir. 1943) stated the rule succinctly:

Whether the work of a particular employee, in an industry that is under the Fair Labor Standards Act, is within the operation of the wage and hour provisions, or is subject to some exemption, should therefore ordinarily be determined from the evidence on a trial and not from a technical construction of the pleadings. A complaint, seeking to recover under the wage and hour provisions of the Act, is certainly not required to negative the exemptions of the statute in order to state a cause of action.

Defendants do not attempt to distinguish the decades of clear judicial precedent in their Motion or their Memorandum; they simply ignore it. Defendants cite *Asher v. Aphelion*, 1999 U.S. Dist. Lexis 8663 (W.D. Va. 1999) for the proposition that “[a]n employee whose primary duty is the management of the enterprise or subdivision in which he was employed, qualifies as a bona fide exempt employee.” This case is inapposite for two important reasons. First, *Asher* was decided on summary judgment after the benefit of full discovery and not on a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

Second, and more important, there is an additional requirement in order for a Defendant to prove that a Plaintiff falls under a bona fide exemption to the terms of the FLSA. In order to prevail on Plaintiff’s FLSA claim, FLSA Defendants must prove not only that a Plaintiff meets the duties test of the exemption, but also that he or she was paid on a salary basis. The Plaintiffs in *Asher* had “[r]eceived the same salary every week, regardless of how many hours they worked” (*See, Asher*, 1999 U.S. Dist. Lexis 8663 at \*3), and the exemption defense was thus successful with regards to some of the Plaintiffs, and unsuccessful with regard to others.

Finally, Defendants’ argument that Plaintiff’s job title is indicative of his exempt status fails also. The law is quite clear that job titles are not accorded any special weight. “In determining whether an employee falls within such an exempt category, neither the name given

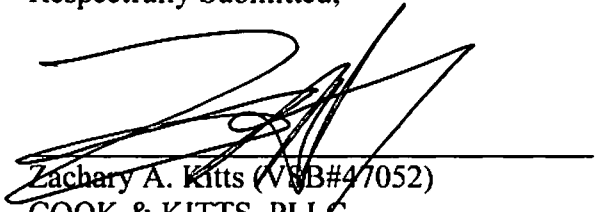
to his position nor that given to the work that he does is controlling, what is controlling is the character of the activities involved in the performance of his job.” *Smith v. United Parcel Service, Inc.*, 890 F. Supp. 523, 526 (S.D.W.Va. 1995) citing *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, 67 S.Ct. 954 (1947).

CONCLUSION

For the reasons stated herein, Plaintiff William Sutherland asks this Court to deny the Defendants’ Motion to Dismiss.

DATED: 7/24/07

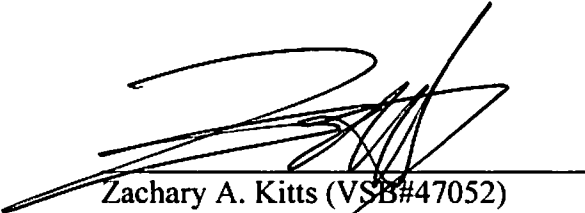
Respectfully Submitted,



Zachary A. Kitts (VSB#47052)  
COOK & KITTS, PLLC  
3554 Chain Bridge Road, Suite 402  
Fairfax, Virginia 22030  
Phone: 703/865-7480  
Fax: 703/434-3510  
Email: [zkitts@cookkitts.com](mailto:zkitts@cookkitts.com)

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July, 2007, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following: Michael E. Barnsback and Hillary Collyer, DiMuroGinsberg, P.C., 908 King Street, Suite 200, Alexandria, Virginia, 22314

A handwritten signature in black ink, appearing to read 'Zachary A. Kitts', is written over a horizontal line. The signature is stylized and somewhat abstract.

Zachary A. Kitts (VSB#47052)  
COOK & KITTS, PLLC  
3554 Chain Bridge Road, Suite 402  
Fairfax, Virginia 22030  
Phone: 703/865-7480  
Fax: 703/434-3510  
Email: [zkitts@cookkitts.com](mailto:zkitts@cookkitts.com)