UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ALVAREZ GARCIA, et al.,

Plaintiffs,

- against -

BERKSHIRE NURSERY & SUPPLY CORP., et al.,

Defendants.
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ORDER

No. 22-CV-8776 (CS)

Seibel, J.

Before the Court is the Motion to Intervene of Proposed Intervenor Julie A. Su, Acting Secretary of Labor, United States Department of Labor, (the "Acting Secretary" or "DOL"). (*See* ECF No. 44.) For the following reasons, the motion is GRANTED.

Background

Plaintiffs commenced the instant action against Defendants on October 14, 2022, seeking, among other things, the recovery of unpaid wages pursuant to the Fair Labor Standards Act ("FLSA"). (*See generally* ECF No. 1.)

In November 2022, the DOL's Wage and Hour Division (the "WHD") opened a separate investigation into two of the Defendants named in Plaintiffs' Complaint, Berkshire Nursery & Supply Corp. and Jesus Flores, to determine whether those two Defendants were in compliance with the FLSA and the Immigration and Nationality Act. (*See* ECF No. 44 at 1.) In the course of that investigation, the Acting Secretary learned that Defendants sought to obtain discovery in the instant litigation concerning Plaintiffs' communications with WHD, via depositions of the Plaintiffs. (*See id.*)

While the Acting Secretary and Defendants attempted to negotiate a stipulation that would permit her to attend those depositions and assert applicable governmental privileges, Defendants ultimately refused to consent to her attendance. (*See id.*) The Acting Secretary subsequently submitted a letter to this Court seeking to intervene pursuant to Fed. R. Civ. P. 24(a)(2), explaining that she wished to do so for the limited purpose of attending Defendants' upcoming depositions of Plaintiffs and asserting any applicable privileges as necessary, including the Government's informant privilege. (*See id.*)

Discussion

"On timely motion, the [district] court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a).[1] In the Second Circuit, the standard governing such a motion is comprised of four factors, whereby "a movant must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action." *In re N.Y.C. Policing*

[1] While Fed. R. Civ. P. 24(c) requires that motions to intervene be accompanied by a pleading that sets out the claim or defense for which intervention is sought, courts in this circuit have dispensed with the pleading requirement where a party seeks to intervene for a limited purpose and where their position is clearly articulated in their motion papers. *See Barry's Cut Rate Stores Inc. v. Visa, Inc.*, No. 05-MD-1720, 2021 WL 2646349, at *13-14 (E.D.N.Y. June 28, 2021) (collecting cases). Here, the Acting Secretary's purpose for seeking intervention is limited and clear – she wishes to attend Defendants' depositions of Plaintiffs for the purpose of asserting privileges held by the Government, as necessary. Accordingly, I waive the requirement that she file a pleading pursuant to Fed. R. Civ. P. 24(c).

During Summer 2020 Demonstrations, 27 F.4th 792, 799 (2d Cir. 2022).[2] "While an applicant must satisfy all four requirements, this test is a flexible and discretionary one, and courts generally look at all four factors as a whole rather than focusing narrowly on any one of the criteria." *Gerschel v. Bank of Am., N.A.*, No. 20-CV-5217, 2021 WL 1614344, at *2 (S.D.N.Y. Apr. 26, 2021).

Here, the parties do not dispute that the Acting Secretary timely filed her motion. (*See generally* ECF Nos. 44, 46.) Instead, Defendants argue that the Acting Secretary has not adequately alleged "an interest that will be impaired if [her] motion is denied." (ECF No. 46 at 1.) Accordingly, my analysis will focus on the remaining three factors at issue.

A. Interest in the Action

In order "for an interest to be cognizable under Rule 24, it must be direct, substantial, and legally protectable." *Floyd v. City of N.Y.*, 770 F.3d 1051, 1060 (2d Cir. 2014). "[A]n interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *Id.*

Here, the Acting Secretary asserts that the DOL "has a legal interest in maintaining strong and effective enforcement of the FLSA, which tasks the Secretary with investigating and enforcing the statute's provisions regarding the payment of minimum wages and overtime premiums." (ECF No. 44 at 2 (internal quotation marks and citation omitted).) She further maintains that the protection of the Government's informant privilege is critical to fulfilling those tasks, as the protecting the identity of individuals who provide information concerning legal violations results in effective law enforcement. (*See id.*)

[2] Unless otherwise indicated, case quotations omit all internal citations, quotation marks, footnotes, and alterations.

Defendants do not appear to seriously contest the sufficiency of the Acting Secretary's interest, (*see generally* ECF No. 46), and at least one other district court has held that the potential disclosure of confidential informant identities implicates a federal agency's interest in its ability to assert the informant's privilege. *See In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, No. MDL-2328, 2013 WL 2456217, at *2 (E.D. La. June 5, 2013) ("The [agency] has an interest relating to [the discovery at issue] as the [discovery] potentially reveal[s] the [agency's] informants' identities and therefore implicate[s] the [agency's] ability to assert the informant's privilege."); *see also Murray v. City of N.Y.*, No. 21-CV-6892, 2023 WL 3984342, at *3 (E.D.N.Y. June 13, 2023) (holding that county district attorney's office intervenor "asserted a sufficient interest in protecting the identity of the confidential informant to justify intervention.").

Accordingly, this factor favors the Acting Secretary.

B. Impairment of the Interest

Next, a proposed intervenor "must be able to show that disposition of the action may, as a practical matter, impair or impede its ability to protect that interest." *L&M Bus Corp. v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, No. 18-CV-1902, 2018 WL 1782709, at *3 (E.D.N.Y. Apr. 12, 2018).

The Acting Secretary maintains that because Defendants "disclaim[] the applicability of the [Government's informant] privilege altogether . . . and have expressed their intention to elicit testimony that may identify informants," her interest in asserting that privilege, which she describes as "one of the DOL's most important enforcement tools," will be impaired if she cannot attend Plaintiffs' depositions. (*See* ECF No. 44 at 3.) Defendants argue, among other things, that there is no such risk of impairment here because Plaintiffs initiated the instant lawsuit

and in so doing abandoned their status as confidential DOL informants, *i.e.*, their identities are already known, and because the informant's privilege itself "is not absolute" and must yield to Defendants' evidentiary needs as they prepare their case. (*See* ECF No. 46 at 1-2.)

There are two problems with Defendants' arguments. First, they presuppose that the informant's privilege is a nullity because they are aware of Plaintiffs' identities. (*See* ECF No. 46 at 2.) But in so doing they misapprehend the Acting Secretary's motion, which makes clear that she seeks to assert the privilege in order to protect the identities of informants associated with WHD's investigation of Defendants more broadly, as well as Plaintiffs' communications with WHD. (*See* ECF No. 44 at 1, 3.) For example, while Plaintiffs' identities are obviously known to Defendants, the Acting Secretary would have a legitimate objection should Defendants question Plaintiffs about whether they were aware of others who communicated with WHD or if they gave WHD the names of other potential witnesses.

Second, while Defendants are certainly correct that the informant's privilege "is not absolute" and "[w]here the identification of an informer or the production of his communications is essential to a fair determination of the issues of the case, the privilege cannot be invoked," *Creighton v. City of N.Y.*, No. 12-CV-7454, 2015 WL 8492754, at *6 (S.D.N.Y. Dec. 9, 2015), their argument that the privilege must yield is premature and conflates the opportunity to assert governmental privileges with the actual assertion of those privileges. Put differently, the issue before me is not whether the Acting Secretary has properly asserted the informant's privilege (or any other governmental privilege for that matter), but rather whether her ability to do so *may be impaired* if she cannot intervene in the instant litigation. *See Home Ins. Co. v. Liberty Mut. Ins. Co.*, No. 87-CV-675, 1990 WL 188925, at *5 (S.D.N.Y. Nov. 20, 1990) ("Rule 24 only requires a showing by [the applicant] that the disposition of the action may as a practical matter impair or

impede [their] ability to protect [their] interest . . . and . . . makes clear that the issue that must be considered is . . . simply the degree to which the applicant may be practically harmed by a judgment in the pending action.").

That standard is readily met here, as the Acting Secretary would be unable to assert the Government's privileges at all absent intervention. *See, e.g.*, *Conover v. Patriot Land Transfer, LLC*, No. 17-CV-4625, 2019 WL 12313482, at *3 (D.N.J. Dec. 13, 2019) (holding that "the [Consumer Financial Protection] Bureau's interest would be impaired if it is unable to intervene in the litigation as it would not be able to assert its [supervisory examination] privilege and would not be able to appeal any adverse determination in the future.").

Accordingly, this factor also favors the Acting Secretary.

C. Representation of Interest

The final factor asks whether the movant's interest is adequately represented by the parties to the litigation. The movant's burden as to this factor is "minimal," and only requires a "show[ing] that the representation of h[er] interest may be inadequate." *In re N.Y.C. Policing*, 27 F.4th at 803.

Defendants do not address this factor, (*see generally* ECF No. 46), but the Acting Secretary maintains that Plaintiffs cannot adequately represent her interests because the privileges at issue belong to the Government and the parties' interests are not identical, (*see* ECF No. 44 at 3). I agree.

It is axiomatic "that the informant's privilege belongs to the Government and not to the informant." *SEC v. Thrasher*, No. 92-CV-6987, 1995 WL 92307, at *5 (S.D.N.Y. Mar. 7, 1995). As such, the Acting Secretary is uniquely situated to assert the privilege and her interest in doing so is inadequately represented by the other parties to this litigation. *See In re Pool Prods.*, 2013

WL 2456217, at *3 ("[B]ecause the privilege belongs to the Government, the [agency's] interests are inadequately represented by the existing parties to the suit."). Plaintiffs' counsel's loyalty is only to Plaintiffs and they do not necessarily have the same motive to protect third parties that the Acting Secretary would have.

Accordingly, this final factor weighs in favor of the Acting Secretary and on balance she has shown that she is entitled to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2).

This is not to say that any questioning of Plaintiffs relating to DOL would be off limits at their depositions. Should the need arise, I will address issues concerning the informant's privilege on a question-by-question basis, bearing in mind that the purposes of the privilege are to encourage open communication with the Government and to protect the anonymity of those who provide information so that they do not risk retaliation. *See Newell v. City of N.Y.*, No. 00-CV-8333, 2003 WL 21361737, at *2 (S.D.N.Y. June 12, 2003) ("The purpose of the informer's privilege is the furtherance and protection of the public interest in effective law enforcement. Furthermore, the privilege recognizes the obligation of citizens to communicate their knowledge of . . . crimes to law-enforcement officials, and, by preserving their anonymity, encourages them to perform their obligation."); *Sec'y of Labor, U.S. Dep't of Labor v. Valley Wide Plastering Constr., Inc.*, No. 18-CV-4756, 2021 WL 410873, at *1 (D. Ariz. Feb. 5, 2021) ("In FLSA actions, informants are an important lot and offering informants the protection of the informant privilege gives the DOL a better chance of candid dialog and provides a particularly effective means of preventing retaliation."). Where, as here, Plaintiffs have chosen to forego their anonymity and have plainly openly accused Defendants, the balancing necessary to determine the applicability of the privilege is not the same as it would be were this action brought by DOL based on information from individuals whose identity was unknown.

Conclusion

For the foregoing reasons, the Acting Secretary's Motion to Intervene, (*see* ECF No. 44), is GRANTED. The Clerk of Court is directed to terminate the pending motion.

SO ORDERED.

Dated: December 8, 2023
White Plains, New York

Cathy Seibel

CATHY SEIBEL, U.S.D.J.