IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JULIE A. SU, Acting Secretary of Labor, United States Department of Labor, Plaintiff, v. **FRIENDSHIP DINER, LLC**, and **BARDHYL SHABANI**, Defendants.	)	Case No. 1:24-cv-00369-SEB-MJD

ACTING SECRETARY OF LABOR'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Plaintiff Julie A. Su, Acting Secretary of the United States Department of Labor ("Acting Secretary"), hereby applies to the Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for entry of a Temporary Restraining Order and a Preliminary Injunction, restraining Friendship Diner, LLC ("Friendship") and Bardhyl Shabani ("Shabani") (collectively, "Defendants") from unlawfully retaliating against and intimidating employees who assert their rights under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201, *et seq.* (the "Act" or "FLSA"). The Acting Secretary seeks the extraordinary relief requested in order to safeguard Defendants' employees from further violation of the FLSA and to prevent harm to the statutorily supported power of the Acting Secretary to investigate and enforce the provisions of the FLSA. In support of this motion, the Acting Secretary files concurrently her "Memorandum of Law in Support of a Temporary Restraining Order and a Preliminary Injunction," with attached exhibits as evidence.

1. The Acting Secretary's complaint alleges violations of the FLSA based upon Defendants' failure to pay their employees minimum wage in violation of 29 U.S.C. §§ 206 and 215(a)(2); failure to pay employees overtime wages in violation of 29 U.S.C. §§ 207 and 215(a)(2);

and unlawful obstruction and retaliatory conduct in violation of the anti-retaliation provision of the FLSA, 29 U.S.C. § 215(a)(3).

2. A temporary restraining order and preliminary injunction are necessary because Defendants' retaliatory conduct has created a chilling effect on their employees that harms the Acting Secretary, Defendants' employees, and the public.

3. District courts have jurisdiction to restrain violations of Section 215 of the FLSA "for cause shown." 29 U.S.C. § 217. The relief requested herein seeks to enjoin the Defendants from retaliating or discriminating in any way against any current or former employees in violation of 29 U.S.C. § 215(a)(3). This injunction is necessary for the reasons set forth herein and in the "Memorandum in Support," supported by the attached exhibits.

4. The evidence presented with this motion demonstrates: (a) there exists a substantial likelihood that the Acting Secretary will prevail at trial on claims Defendants violated the FLSA's anti-retaliation provision; and (b) with no adequate remedy at law, in the absence of preliminary relief, Defendants' employees, the Acting Secretary, and the public, will suffer irreparable harm because of the chilling effect created by Defendants' retaliatory conduct.

WHEREFORE, to facilitate enforcement of the FLSA and protect Defendants' employees, the Acting Secretary, and the public from further harm, the Acting Secretary moves the Court to issue a Temporary Restraining Order enjoining Defendants from any further retaliation against or intimidation of their employees in violation of the FLSA. In addition, the Acting Secretary moves this Court to issue a Preliminary Injunction to the same effect to be entered upon the expiration of the Temporary Restraining Order and for all other just and proper relief. Specifically, the Acting Secretary requests that the Court immediately issue an order restraining all Defendants and their agents, and all those in active concert and participation with them, as follows:

1. Defendants and their agents are enjoined from retaliating or discriminating in any way against any current or former employee of Friendship Diner, LLC in violation of 29 U.S.C. § 215(a)(3);

2. Defendants and their agents are enjoined from interrogating, inquiring about or discussing with any employees or former employees in this case the employees' potential or actual communications with the Acting Secretary or other agents of the Department of Labor;

3. Defendants and their agents are enjoined from withholding wages, terminating or threatening to terminate any employee, or retaliating or discriminating against their employees in any other way, based upon Defendants' belief that such employee has cooperated with the Department of Labor or has engaged in any other protected activity under the Fair Labor Standards Act;

4. Defendants and their agents are enjoined from communicating with any employee between the date of this Order and the trial in this action for the purposes of investigating plaintiff's claims, preparing a defense, gathering evidence or executing declarations, without first informing the employee, in writing with written translation in that employee's primary language, about the nature and existence of this lawsuit, that such communications are voluntary, and that employees cannot be discriminated or retaliated against in any way;

5. Defendants shall allow representatives of the Secretary to read aloud in English, Spanish, and any other language understood by the majority of Defendants' employees, during employees' paid working hours and in the presence of Defendant Bardhyl Shabani, the following statement to all employees employed at Friendship Diner, LLC:

> **You are protected by the Fair Labor Standards Act and have the right to participate freely in the U.S. Department of Labor's investigation and litigation. You have the right to speak freely with investigators, attorneys, or other officials from the Department of Labor. It is illegal for your employer to fire you, withhold wages, reduce your wages or your hours, threaten to call immigration authorities, or otherwise retaliate against you for speaking to the Department of Labor or testifying as a witness in this matter. All employees**

have the right to be lawfully paid for the work they perform, regardless of race, ethnicity, or immigration status.

The U.S. District Court for the Southern District of Indiana has ordered Friendship Diner, LLC, Bardhyl Shabani, and anyone acting on their behalf, to cease coercing, retaliating against, threatening to retaliate against, intimidating, or attempting to influence or in any way threatening employees for providing information to the Department of Labor.

6. Defendants shall post the above statement in English, Spanish, and any other language understood by the majority of Defendants' employees, with contact information for representatives of the Secretary, in a conspicuous location at each location they operate and permit the Secretary to provide each employee with the same;

7. Defendants shall, prior to terminating any employee for any reason, provide a written notice to the Wage and Hour Division of the U.S. Department of Labor at least seven days prior to any termination; and

8. Order all such other relief as may be appropriate, just, and proper.

Date: March 6, 2024

Respectfully Submitted,

SEEMA NANDA
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

/s/ Haley R. Jenkins
HALEY R. JENKINS
Trial Attorney

Counsel for Julie A. Su, Acting Secretary of Labor, U.S. Department of Labor, Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2024, the foregoing document was filed electronically with the Court's electronic filing system. Notice of this filling will be sent to all parties by operation of the Court's electronic filing system.

/s/ Haley R. Jenkins
HALEY R. JENKINS
Trial Attorney
One of Plaintiff's Attorneys

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JULIE A. SU, Acting Secretary of Labor, United States Department of Labor, Plaintiff, v. **FRIENDSHIP DINER, LLC**, and **BARDHYL SHABANI**, Defendants.	)	Case No. 1:24-cv-00369-SEB-MJD

[PROPOSED] ORDER

This matter coming before the Court on Plaintiff's Motion for a Temporary Restraining Order and a Preliminary Injunction, due notice being given, it is so ordered:

1. Defendants and their agents are enjoined from retaliating or discriminating in any way against any current or former employee of Friendship Diner, LLC in violation of 29 U.S.C. § 215(a)(3);

2. Defendants and their agents are enjoined from interrogating, inquiring about or discussing with any employees or former employees in this case the employees' potential or actual communications with the Acting Secretary or other agents of the Department of Labor;

3. Defendants and their agents are enjoined from withholding wages, terminating or threatening to terminate any employee, or retaliating or discriminating against their employees in any other way, based upon Defendants' belief that such employee has cooperated with the Department of Labor or has engaged in any other protected activity under the Fair Labor Standards Act;

4. Defendants and their agents are enjoined from communicating with any employee between the date of this Order and the trial in this action for the purposes of investigating plaintiff's claims, preparing a defense, gathering evidence or executing declarations, without first informing the

employee, in writing with written translation in that employee's primary language, about the nature and existence of this lawsuit, that such communications are voluntary, and that employees cannot be discriminated or retaliated against in any way;

5. Defendants shall allow representatives of the Secretary to read aloud in English, Spanish, and any other language understood by the majority of Defendants' employees, during employees' paid working hours and in the presence of Defendant Bardhyl Shabani, the following statement to all employees employed at Friendship Diner, LLC:

> **You are protected by the Fair Labor Standards Act and have the right to participate freely in the U.S. Department of Labor's investigation and litigation. You have the right to speak freely with investigators, attorneys, or other officials from the Department of Labor. It is illegal for your employer to fire you, withhold wages, reduce your wages or your hours, threaten to call immigration authorities, or otherwise retaliate against you for speaking to the Department of Labor or testifying as a witness in this matter. All employees have the right to be lawfully paid for the work they perform, regardless of race, ethnicity, or immigration status.**
>
> **The U.S. District Court for the Southern District of Indiana has ordered Friendship Diner, LLC, Bardhyl Shabani, and anyone acting on their behalf, to cease coercing, retaliating against, threatening to retaliate against, intimidating, or attempting to influence or in any way threatening employees for providing information to the Department of Labor.**

6. Defendants shall post the above statement in English, Spanish, and any other language understood by the majority of Defendants' employees, with contact information for representatives of the Secretary, in a conspicuous location at each location they operate and permit the Secretary to provide each employee with the same; and

7. Defendants shall, prior to terminating any employee for any reason within the next two years, provide a written notice to the Wage and Hour Division of the U.S. Department of Labor at least seven days prior to any termination.

_____ _____

Date U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT
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ACTING SECRETARY OF LABOR'S MEMORANDUM OF LAW IN SUPPORT OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Plaintiff Julie A. Su, Acting Secretary of Labor, U.S. Department of Labor ("Acting Secretary"), respectfully submits this memorandum of law in support of her motion for a temporary restraining order and preliminary injunction enjoining Defendants Friendship Diner, LLC ("Friendship") and Bardhyl Shabani ("Shabani") (collectively, "Defendants") from further unlawful retaliatory conduct in violation of the anti-retaliation provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* ("the Act" or "FLSA").

PRELIMINARY STATEMENT

Defendants are engaged in ongoing retaliation against their employees by threatening, intimidating, and coercing current employees into falsely certifying that Defendants' tip pooling scheme at issue in this litigation was voluntary. Defendants' actions plainly constitute wanton, unlawful, and ongoing retaliation against employees in clear violation of Section 15(a)(3) of the Act, 29 U.S.C. § 215(a)(3), and frustrate the government's efforts to enforce the law.

The Acting Secretary's future enforcement efforts and Defendants' current and former employees are threatened with irreparable harm absent immediate action to enjoin Defendants' continued unlawful conduct. Their unlawful conduct imperils the Acting Secretary's ability to enforce the FLSA, deters employees from asserting their rights under the Act, and undermines the public's interest in effective enforcement of the Act. Congress enacted the FLSA to protect workers by establishing federal minimum wage and overtime guarantees, and to protect law-abiding employers from unfair competition from employers who fail to comply with the Act's requirements. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706–707 & n. 18 (1945); 29 U.S.C. §§ 202(a), 206-207. The Acting Secretary's investigations and enforcement actions serve these important public interests and must not be hindered or obstructed through unlawful retaliation.

Accordingly, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Acting Secretary seeks: (1) a temporary restraining order, to be in effect until a hearing is held concerning a

preliminary injunction, and (2) a preliminary injunction. This requested relief seeks to enjoin Defendants and their agents from continuing to violate Section 15(a)(3) of the FLSA by threatening, intimidating, coercing, or retaliating against their current and former employees in an attempt to hinder employees' ability to recover back wages and liquidated damages owed to them.

BACKGROUND

Defendant Friendship Diner, LLC ("Friendship") is an Indiana limited liability company with a principal address at 834 Tutor Lane, Evansville, Indiana 47715. (ECF No. 1 ¶ 3). Defendant Bardhyl Shabani ("Shabani") owns and operates Friendship. (*Id.* ¶¶ 7-9). Shabani hires and directs the work of employees, sets pay rates, and collected pooled tips from servers as part of a mandatory tip pooling arrangement. (*Id.* ¶ 8).

In 2023, on behalf of the Acting Secretary, the Wage and Hour Division of the United States Department of Labor ("WHD") investigated Friendship and Shabani's wage and hour practices. (*Id.* at 1). That investigation covered the period February 22, 2021, through February 19, 2023 (the "Investigation Period"). (*Id.*). During the investigation, WHD determined Defendants had violated multiple FLSA provisions, including Section 203(m)(2)(B)'s tip credit provisions, Section 206's minimum wage provisions, Section 207's overtime provisions, and Section 211's recordkeeping provisions. (*Id.* ¶¶ 13, 24, 30, 39). WHD found Defendants did not comply with the valid tip pool requirements under Section 203(m) because they did not allow for tipped employees to keep all tips. (*Id.* ¶¶ 13-23). Instead of allowing servers to keep their tips, Defendants required them to give management $10 per weekday shift and $15 per weekend shift; management allegedly used servers' tips to pay bussers' hourly wages. (*Id.* ¶ 16). Defendants claimed the tip credit, paying their servers $2.35 per hour and allegedly using tips to make up the difference between $2.35 and the federal minimum wage. (*Id.* ¶ 14). But Defendants operated an invalid tip pool, so they are not able to

receive the tip credit and they owe servers back wages for the improperly taken tip credit. (*Id.* ¶¶ 20-23).

WHD also found three types of overtime violations. First, Defendants only paid their kitchen staff for half of their hours on payroll. (*Id.* ¶¶ 31-32). They paid their kitchen staff cash at their regular rates—without the required overtime premium—for the rest of their hours. (*Id.* ¶ 33). Second, Defendants paid some servers their regular rates time for all hours worked, again neglecting to pay the required overtime premium. (*Id.* ¶ 34). Third, Defendants paid other servers overtime 1.5 times their cash wage ($3.53 per overtime hour) instead the legally-required 1.5 times the minimum wage less the tip credit claimed ($5.98 per overtime hour). (*Id.* ¶ 35). Finally, WHD found recordkeeping violations for failure to display the FLSA poster and failure to maintain accurate records. (*Id.* ¶ 39). Defendants did not have any time records, nor could they produce complete records of cash payments to back-of-the-house workers. (*Id.* ¶ 41-42). WHD determined Defendants owe employees back wages and liquidated damages for the Investigation Period. (*Id.* ¶¶ 62-64).

Beginning in January 2024, Shabani began telling servers that he would bring his attorney to the diner to talk to them. (Exhibit 1, Decl. of Wage and Hour Investigator Christopher Huber ("Huber Decl.") ¶ 11). Shabani instructed servers to tell his attorney that the tip pool was voluntary and that he never threatened to take days away from anyone if they would not participate. (*Id.*). Shabani pressured servers to speak with his attorney and to sign statements stating the tip pool is voluntary. (*Id.* ¶ 12). Some servers wrote statements that the tip pool was voluntary in exchange for financial incentives from Shabani. (*Id.* ¶ 13). In late January and early February 2024, Shabani called employees at home to pressure them to sign statements on his behalf, offering financial incentives to do so. (*Id.* ¶ 14). One server expressed fear for their physical safety if Shabani knew the employee exercised their legally-protected right to speak with WHI Huber. (*Id.* ¶ 15).

On February 9, 2024, WHD sent notices to all 44 current and former Friendship employees advising them of their rights under the FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3). (Huber Decl. ¶ 17; Exhibit A to Huber Decl.). On February 9, 2024, WHD sent Shabani's attorney a letter requesting Defendants cease and desist any retaliatory conduct and any attempts to circumvent the government informer's privilege. (Huber Decl. ¶ 18; Exhibit B to Huber Decl.).

Following receipt of WHD's letter, Shabani continued to threaten employees in violation of Section 215(a)(3) of the FLSA. Shabani threatened to take a day of work away from servers who would not sign statements that the tip pool was voluntary. (Huber Decl. ¶¶ 19-20). Shabani began seating guests at the diner, seating fewer people in the sections of server who would not sign statements on his behalf. (*Id.* ¶ 19). Shabani began asking employees if they are "the rat" that reported his retaliation to WHD, asking employees if they called the Department of Labor, and harassing employees at work by following them around the restaurant. (*Id.*). Employees reported to WHI Huber that it had been very hostile at the diner following receipt of WHD's cease-and-desist letter. (*Id.* ¶ 20). Shabani also told employees if they received any money as a result of WHD's investigation, it is his money and had to be returned to him. (*Id.* ¶ 20). According to employees who have contacted WHI Huber, Defendants' retaliatory actions are ongoing.

JURISDICTION

This Court has jurisdiction of this action pursuant to section 17 of the Act, 29 U.S.C. § 217 and 28 U.S.C. §§ 1331 and 1345.

LEGAL STANDARD

To obtain a TRO or preliminary injunction, a plaintiff must show (1) she has some likelihood of success on the merits of her claim; (2) traditional legal remedies are inadequate; and (3) she would suffer irreparable harm without preliminary injunctive relief. *Speech First, Inc. v. Killeen*, 968

F.3d 628, 637 (7th Cir. 2020).; *Long v. Bd. of Educ., Dist. 128*, 167 F. Supp. 2d 988, 990 (N.D. Ill. 2001) (TRO and preliminary injunction standard is "functionally identical").

Once a showing on the first three factors is made, "the court weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied." *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (citing *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011) (internal citations omitted)). These factors are weighed on a "sliding scale," or in other words, "the more likely the party's chance of success on the merits, the less the balance of harms need weigh in favor and vice-versa." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F. 3d 962, 972 (7th Cir. 2012); *see also Long*, 167 F. Supp. 2d at 990. In addition, a court need only hold an evidentiary hearing if "genuine issues of material fact are created by the response to a motion for a preliminary injunction." *In re Aimster Copyright Litig.*, 334 F. 3d 643, 654 (7th Cir. 2003).

ARGUMENT

I. THIS COURT SHOULD ENJOIN DEFENDANTS FROM RETALIATING AGAINST EMPLOYEES.

The Court must enjoin Defendants from continuing their retaliatory and intimidating conduct. As set forth below, the Acting Secretary meets all of the requirements for issuance of a TRO and preliminary injunction because: (1) the Acting Secretary is likely to succeed on the merits of her claims that Defendants' retaliated against and intimidated their employees from asserting their rights under the Act; (2) there is no adequate remedy at law absent the entry of a temporary restraining order; and (3) Defendants' employees and the Department will suffer irreparable harm absent a temporary restraining order. Crucially, the balance of hardships tips decidedly in favor of the Department and the public interest.

A. The Acting Secretary is Likely to Succeed on the Merits of Her Claims.

The FLSA's anti-retaliation provision, Section 15(a)(3), is the guardian of the statute's enforcement scheme because it protects the ability of employees to communicate freely with the Secretary concerning their hours and wages. *See Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Enforcement of the FLSA's protections relies "not upon 'continuing detailed federal supervision or inspection of payrolls,' but upon 'information and complaints received from employees.'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11-12 (2011) (quoting *Robert DeMario*, 361 U.S. at 292). "Unchecked retaliation, no matter what form, subverts the purpose of the FLSA." *Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010).

Section 15(a)(3) prohibits "any person" from, among other things, "discharg[ing] or in any other manner discriminat[ing] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter [8 of the Act], or has testified or is about to testify in any such proceeding." 29 U.S.C. § 215(a)(3). To prevail on an FLSA retaliation claim, the Acting Secretary must show that: (i) an employee engaged in statutorily protected activity; (ii) the employer or its agent subjected that employee to an adverse action; and (iii) that adverse action was because of the protected activity. *See Scott v. Sunrise Healthcare Corp.*, 195 F.3d 938, 940 (7th Cir. 1999); *Tolene v. T-Mobile, USA, Inc.,* 178 F. Supp. 3d 674, 681 (N.D. Ill. 2016).

FLSA retaliation claims are analyzed under the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 876 (2d Cir. 1988). A plaintiff establishes a *prima facie* case of retaliation by showing "(1) participation in a protected activity known to the defendant . . . ; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action." *Mullins*, 626 F.3d at 53. If the defendant articulates a legitimate, non-discriminatory reason for its conduct, the plaintiff must produce evidence that retaliation is more likely than not the real

reason for the employment action. *Id.* at 53–54. The Acting Secretary meets all the required elements to establish a *prima facie* case of retaliation. Absent action by the Court, Defendants' retaliation and intimidation will likely continue unabated.

1. Speaking Truthfully and Cooperating with the Acting Secretary's Investigation Is Protected Activity.

The Supreme Court has repeatedly instructed that worker protection statutes such as the FLSA should be construed to "provide broad rather than narrow protection to the employee." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011) (holding that the "enforcement needs" of the FLSA suggests an expansive "interpretation of the word 'complaint'"). In *Kasten*, for example, the Supreme Court found that Section 15(a)(3) covers oral complaints to the Department of Labor. *Id.* at 4. Likewise, under the National Labor Relations Act's anti-retaliation provision, which similarly prohibits retaliation against employees who "filed charges or give testimony," the Supreme Court has held that it covers workers who did not formally testify or file charges, but simply participated in an investigation. *Id.* at 13 (citing 29 U.S.C. § 158(a)(4) and *NLRB v. Scrivener*, 405 U.S. 117, 123 (1972)).

Further, it is well-established that an oral complaint to the Department is protected activity. *See* 29 U.S.C. § 215(a)(3); *Kasten*, 563 U.S. at 14. That Defendants threatened adverse action or otherwise intimidated or coerced employees to discourage them from cooperating with the Department's investigation does not make the act of discussing their compensation with an investigator any less protected. *See Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1228 (10th Cir. 1993) ("Action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact"). Indeed, if employers could retaliate against employees in advance of their cooperation with the Department, Section 15(a)(3) would be meaningless. *See Robert DeMario Jewelry, Inc.*, 361 U.S. at 292; *Greathouse v. JHS Sec. Inc.*, 784

F.3d 105, 113 (2d Cir. 2015) ("Congress enacted [the FLSA's anti-retaliation provision] to 'prevent[] fear of economic retaliation from inducing workers quietly to accept substandard conditions' . . . and to foster an atmosphere protective of employees who lodge such complaints.") (quoting *Kasten*, 563 U.S. at 2). Accordingly, providing truthful information and cooperating with the Acting Secretary's investigation is protected activity.

In this case, Defendants' employees engaged in protected activity under Section 15(a)(3) when they have communicated with the Acting Secretary's representative as part of the Acting Secretary's investigation of Defendants. (*See* Huber Decl.). Further, because Defendants' employees are potential witnesses for the Acting Secretary's litigation related to Defendants' pay schemes, their future potential testimony is protected activity. *See, e.g.*, *Acosta v. Austin Elec. Servs. LLC*, 322 F. Supp. 3d 951, 957 (D. Ariz. 2018). As such, they have engaged in protected activity covered by the Act.

2. Defendants' Employees Also Engaged in Protected Activity When They Were Coerced into Falsely Certifying Defendants' Tip Pool Was Voluntary, and When They Refused to Sign Such Statements.

Further, Defendants' employees engaged in protected activity both when they were coerced and intimidated into falsely certifying Defendants' tip pool was voluntary and when they refused to sign false statements. The Seventh Circuit has held "an employee's assertion of rights protected under the FLSA" is sufficient to meet the broad definition of protected activity. *See Crowley v. Pace Suburban Bus Div. of Regional Transp. Authority*, 938 F.2d 797, 798 n.3 (citing *Brock v. Casey Truck Sales, Inc.,* 839 F.2d 872, 879 (2nd Cir.1988) (protected activities include "activities less directly connected to formal proceedings where retaliatory conduct has a similar chilling effect on employees' assertion of rights."). Indeed, "[p]rotection against discrimination for instituting FLSA proceedings would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act." *Id. See also Donovan v. Rockwell Tire & Fuel, Inc.*, No. C-79-498, 1982 WL 2120, at *9 (M.D. N.C. March 30, 1982) ("Section 15(a)(3) was specifically designed to protect employees from retaliatory

discharge; to protect employees who refused to return back wages to their employer; and to protect those employees who succumbed to the employers' unlawful tactics and returned their back wages."), *aff'd* 711 F.2d 1050 (4th Cir. 1983).

Here, Defendants' employees engaged in protected activity when, because of Defendants' coercion and intimidation, they signed statements falsely certifying Defendants' tip pool was voluntary. (Huber Decl. ¶¶ 11-13). Defendants effectively bribed certain employees to sign statements against their own interests and rights under the FLSA. (*Id.* ¶ 13). Defendants' employees also engaged in protected activity when they refused to sign false statements regarding the voluntary nature of the tip pool, thereby asserting their rights under the Act. (*Id.* ¶¶ 14-16).

B. Defendants' Coercion and Intimidation Are Adverse Employment Actions.

An adverse employment action is one that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (decided in the context of Title VII, which uses the same three-part test regarding retaliation), discussing *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005); *see also Roney v. Ill. Dep't of Transp.*, 474 F.3d 455, 461 (7th Cir. 2007) (retaliatory actions are "not limited to those that affect the terms and conditions of one's employment"); *Odicho v. Swedish Covenant Hosp.*, No. 17 C 6995, 2018 WL 1064590, at *4 (N.D. Ill. Feb. 27, 2018) ("All that is required to state a retaliation claim is an action that would have dissuaded a reasonable worker from making or supporting a charge of illegal conduct.").

Defendants' behavior towards employees was designed to—and has in fact—dissuaded reasonable workers from making or supporting a charge of illegal conduct in speaking with the Department. (Huber Decl. ¶¶ 11-16, 19-20). Defendants' conduct includes:

- coercing employees to sign statements falsely attesting Defendants' tip pool was voluntary;

- threatening reduced work hours or termination for failure to sign statements on Defendants' behalf;
- reducing employees' opportunities to make tips by seating fewer customers in their sections;
- calling and texting employees when they are not working to pressure them to sign statements on Defendants' behalf;
- threatening to orchestrate a kickback scheme; and
- intimidating or harassing employees by following them around the restaurant asking whether they spoke to representatives from the Department of Labor.

(Huber Decl. ¶¶ 11-16, 19-20). Any of these actions—not to mention their cumulative effect—would "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *See Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68 ("An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace.").

By coercing employees to falsely certify Defendants' tip pool was voluntary, by soliciting other employees to do the same, and by threatening termination, Defendants effectively communicated to employees they were not free to discuss or disclose details of their working conditions to the Department and, thereby, participate in the investigation. *See Austin Elec. Servs.*, 322 F. Supp. 3d at 962 (granting preliminary injunction where Secretary was "likely to succeed on the merits of a claim that Defendants' actions in obtaining its employees['] retroactive declarations, under coercive circumstances and during a pending Department investigation into Defendants' payment practices, violated the FLSA's anti-retaliation provision").

C. There Is a Clear Causal Connection Between the Protected Activity and the Adverse Action.

A causal connection between an employee's protected activity and an adverse action can be established through "direct evidence of a causal link, or 'circumstantial evidence that is relevant and probative on any of the elements of a direct case of retaliation.'" *Kasten*, 703 F.3d 966, 972 (7th Cir. 2012) (citing *Treadwell v. Office of Ill. Sec. of State*, 455 F.3d 778, 781 (7th Cir. 2006)). Here, the causal

connection is clear. Defendants' threats and coercion are directly related to the Acting Secretary's investigation and damages due to employees under the FLSA. There is no need to look further to discover why Defendants took these actions; the motivation is clear on its face: Defendants' aim was to dissuade workers from benefiting from and participating in an FLSA investigation by coercing, intimidating, and threatening employees for asserting their rights under the Act.

The Acting Secretary is likely to succeed on the merits of the retaliation claim. This Court should not tolerate Defendants' retaliatory conduct that undermines the purpose and enforcement of the FLSA.

D. Defendants' Employees, the Department of Labor, and the Public Will Suffer Irreparable Harm Absent a Temporary Restraining Order.

Although the Seventh Circuit has not directly addressed the matter, it is established in other jurisdictions that retaliation and impaired enforcement of federal law constitutes irreparable harm for purposes of a preliminary injunction or temporary restraining order.[1] *See Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010); *Holt v. Cont'l Grp., Inc.*, 708 F.2d 87, 91 (2d Cir. 1983) (where "[a] retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the Act or from providing testimony for the plaintiff in her effort to protect her own rights," irreparable injury may be threatened); *Arcamuzi v. Cont'l Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) ("[M]ore than economic harm is involved when an employer retaliates against protected activity."); *see also DeNovellis v. Shalala*, 135 F.3d 58, 64–65 (1st Cir. 1998) (affirming

[1] Arguably, the Acting Secretary need not establish irreparable harm in an action initiated by an agency of the United States to enforce the provisions of remedial statutes such as the FLSA. Instead, irreparable harm is presumed from the fact the statute has been violated. *See, e.g., United States v. Town of Cicero, Ill.*, 786 F.2d 331, 337 (7th Cir. 1986) ("Probably no more [than establishing likelihood of prevailing on the merits] is required to entitle the government to a preliminary injunction under a statute that expressly authorizes it to seek such relief . . . .") (citations omitted).

denial of preliminary injunction based on specific facts of the case, but recognizing that "chilling effect" can cause irreparable injury).

Absent an injunction, the Acting Secretary's enforcement efforts will also be irreparably harmed. The FLSA authorizes the Acting Secretary to conduct wage and hour investigations—and, specifically, to conduct employee interviews—for enforcement purposes. 29 U.S.C. § 211(a). The Act is designed to protect the employees who participate in FLSA investigations by prohibiting their employers from retaliating against them. 29 U.S.C. § 215(a)(3). These provisions are in place to ensure that employers comply with the FLSA, and employees can receive back wages and other damages for violations. If Defendants are allowed to frustrate WHD's investigation into their employment practices by harassing and threatening employees, they significantly curtail the Acting Secretary's ability to conduct investigations and, therefore, enforce the Act. Further, in conducting investigations and litigating cases against employers who have committed FLSA violations, the Acting Secretary relies on the testimony of workers. Employees are unlikely to feel free to testify truthfully or cooperate with the Acting Secretary if they know they may be required to kick back their wages or to be terminated. "[E]ffective enforcement [of the FLSA] . . . could only be expected if employees felt free to approach officials with their grievances." *Robert DeMario Jewelry*, 361 U.S. at 365.

Coercing, intimidating, or terminating employees who refuse to falsely certify the Defendants' tip pool was voluntary poses a clear and direct threat to the Acting Secretary's ability to enforce national labor policy. *See Mullins*, 626 F.3d at 55 ("the resulting weakened enforcement of federal law can *itself* be irreparable harm") (quoting *Lin v. Great Rose Fashion, Inc.*, No. 08-CV-4778(NGG)(RLM), 2009 WL 1544749, at *21 (E.D.N.Y. June 3, 2009)) (emphasis in original). Defendants' actions severely undermine the likelihood that other employees will cooperate with the Department and accept the back wages and liquidated damages they are owed. Accordingly, this

Court must restrain Defendants' conduct from further compromising the Acting Secretary's ability to enforce all employees' FLSA rights.

E. The Balance of Harms: Public Interest Favors Issuing a Temporary Restraining Order and Preliminary Injunction.

The harm that would result to the Department's enforcement efforts and to the public, absent an injunction, outweighs any harm Defendants would suffer from an injunction. The Acting Secretary enforces an important public interest under the FLSA, and through this proceeding is seeking to raise the labor standards for marginalized employees. *See, e.g.*, *Marshall v. Chala Enterprises, Inc.*, 645 F.2d 799, 804 (9th Cir. 1981) ("In exercising its discretion, the district court must give substantial weight to the fact the Secretary seeks to vindicate a public, and not a private, right."); *Martin v. Funtime, Inc.*, 963 F.2d 110, 113 (6th Cir. 1992); *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2nd Cir. 1980) ("[O]nce the Government has shown a reasonable likelihood of success on the merits, the equities will usually tip in its favor, since private interests must be subordinated to public ones."). As noted above, the Acting Secretary's enforcement of the anti-retaliation provision via injunctive relief is crucial to ensuring compliance with the Act. *See Robert DeMario*, 361 U.S. at 292 ("By the proscription of retaliatory acts set forth in [Section] 15(a)(3), and its enforcement in equity by the Secretary pursuant to [Section] 17, Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced."). The public interest, therefore, strongly favors a TRO and preliminary injunction.

The only thing Defendants are being requested to do is comply with the law. The "primary consideration is to be given, not to the individual defendant but to the 'hardship' imposed on the community by permissive existence of substandard labor conditions." *Brock v. Kentucky Ridge Mining, Inc.*, 635 F. Supp. 444, 452 (W.D. Ky. 1985) (citing *United States v. Darby*, 312 U.S. 100, 122 (1941)). *See also N.L.R.B. v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996) (where employer had

engaged in retaliation and complained that it would not be able to discipline employees, the Seventh Circuit held "the company always has the legal right to discipline an employee *in a nondiscriminatory fashion* for improper conduct" (emphasis added)). Defendants have no legitimate interest in retaliating against, coercing, or intimidating their employees for cooperating with the Department. Therefore, the balance weighs entirely in the Acting Secretary's favor.

CONCLUSION

For the reasons set forth above, the Acting Secretary respectfully requests the Court enter a temporary restraining order, and thereafter a preliminary injunction, prohibiting Defendants from any further retaliation against or intimidation of their employees in violation of the FLSA. Specifically, the Acting Secretary requests the Court immediately issue an order restraining all Defendants and their agents, and all those in active concert and participation with them, as follows:

1. Defendants and their agents are enjoined from retaliating or discriminating in any way against any current or former employee of Friendship Diner, LLC, in violation of 29 U.S.C. § 215(a)(3);

2. Defendants and their agents are enjoined from interrogating, inquiring about or discussing with any employees or former employees in this case the employees' potential or actual communications with the Acting Secretary or other agents of the Department of Labor;

3. Defendants and their agents are enjoined from withholding wages, terminating or threatening to terminate any employee, or retaliating or discriminating against their employees in any other way, based upon Defendants' belief that such employee has cooperated with the Department of Labor or has engaged in any other protected activity under the Fair Labor Standards Act;

4. Defendants and their agents are enjoined from communicating with any employee between the date of this Order and the trial in this action for the purposes of investigating plaintiff's claims, preparing a defense, gathering evidence or executing declarations, without first informing the employee, in writing with written translation in that employee's primary language, about the nature and existence of this lawsuit, that such communications are voluntary, and that employees cannot be discriminated or retaliated against in any way;

5. Defendants shall allow representatives of the Acting Secretary to read aloud in English, Spanish, and any other language understood by the majority of Defendants' employees, during employees' paid working hours and in the presence of Defendant Bardhyl

Shabani, the following statement, attached as Exhibit 2, to all employees employed at Friendship Diner, LLC:

You are protected by the Fair Labor Standards Act and have the right to participate freely in the U.S. Department of Labor's investigation and litigation. You have the right to speak freely with investigators, attorneys, or other officials from the Department of Labor. It is illegal for your employer to fire you, withhold wages, reduce your wages or your hours, threaten to call immigration authorities, or otherwise retaliate against you for speaking to the Department of Labor or testifying as a witness in this matter. All employees have the right to be lawfully paid for the work they perform, regardless of race, ethnicity, or immigration status.

The U.S. District Court for the Southern District of Indiana has ordered Friendship Diner, LLC, Bardhyl Shabani, and anyone acting on their behalf, to cease coercing, retaliating against, threatening to retaliate against, intimidating, or attempting to influence or in any way threatening employees for providing information to the Department of Labor.

6. Defendants shall post the above statement in English, Spanish, and any other language understood by the majority of Defendants' employees, with contact information for representatives of the Acting Secretary, in a conspicuous location at each location they operate and permit the Acting Secretary to provide each employee with the same;

7. For two years, Defendants shall, prior to terminating any employee for any reason, provide a written notice to the Wage and Hour Division of the U.S. Department of Labor at least seven days prior to any termination; and

8. Order all such other relief as may be appropriate, just, and proper.

Date: March 6, 2024

Respectfully Submitted,

SEEMA NANDA
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

/s/ Haley R. Jenkins
HALEY R. JENKINS
Trial Attorney

Counsel for Julie A. Su, Acting Secretary of Labor, U.S. Department of Labor, Plaintiff

U.S. Department of Labor
Office of the Solicitor
230 S. Dearborn Street
Suite 844
Chicago, Illinois 60604
312.353.1218
jenkins.haley.r@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2024, the foregoing document was filed electronically with the Court's electronic filing system. Notice of this filling will be sent to all parties by operation of the Court's electronic filing system.

/s/ Haley R. Jenkins
HALEY R. JENKINS
Trial Attorney
One of Plaintiff's Attorneys

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JULIE A. SU, Acting Secretary of Labor, United States Department of Labor,	)	
Plaintiff,	)	Case No. 1:24-cv-00369-SEB-MJD
v.	)	
FRIENDSHIP DINER, LLC, and **BARDHYL SHABANI**,	)	
Defendants.	)	

DECLARATION OF WAGE AND HOUR INVESTIGATOR CHRISTOPHER HUBER

I, Christopher Huber, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746, that the following is true and correct to the best of my knowledge:

1. I submit this declaration in support of the Acting Secretary of Labor's Memorandum of Law in Support of a Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue.

2. I make this declaration based upon personal knowledge of the facts and circumstances relevant to this matter and, if called, would testify to the facts provided herein.

3. I am employed as an Investigator in the Indianapolis, Indiana District Office of the Wage and Hour Division ("WHD"), United States Department of Labor. I have been employed by WHD for 14 years. My duty station is Newburgh, IN.

4. As an Investigator, I investigate the wages, hours, and other conditions and practices of employment of employers and others subject to the various statutes that the Department of Labor enforces, including the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (the "Act" or "FLSA"), which requires the payment of the statutory minimum wage and the payment of one and one-half the employee's regular rate of pay for hours worked over 40 in a week. The FLSA and

corresponding regulations also require the maintenance of accurate records worked and compensation received by employees. Further, the FLSA prohibits employers from retaliating or discriminating against employees because they file a complaint with WHD or participate in a WHD investigation.

Defendants

5. Defendant Friendship Diner, LLC ("Friendship") is an Indiana limited liability company located at 834 Tutor Lane, Evansville, Indiana 47715.

6. Defendant Bardhyl Shabani ("Shabani") is, and at all relevant times was, the owner of Friendship.

WHD's Investigation

7. In October 2022, WHD initiated an investigation of Friendship and Shabani to determine whether their employment practices complied with the FLSA. As part of my investigation, I reviewed Defendants' payroll and time records, spoke with Shabani, and interviewed employees.

8. Based on documents and information gathered during the investigation, I concluded the enterprise had violated the provisions of the FLSA. Specifically, I determined that Defendants violated the FLSA in the following ways:

a. Section 203(m)(2)(B): Defendants did not comply with the valid tip pool requirements pursuant to Section 203(m) because, by requiring servers to give management $10 per weekday shift and $15 per weekend shift that management allegedly used to pay bussers' hourly wages, they did not allow tipped employees to retain all tips.

b. Section 206: Defendants claimed the tip credit, paying their servers $2.35 per hour and allegedly using tips to make up the difference between $2.35 and

the federal minimum wage. However, because Defendants operated an invalid tip pool, they are not able to receive the tip credit, and servers are owed back wages for the improperly taken tip credit.

c. Section 207: I found three types of overtime violations. First, for the kitchen staff, Defendants only paid for half of their hours on payroll. The other half of the kitchen staff's hours were paid in cash to the employees. Employees did not receive the half-time premium for hours worked over 40 in a workweek. Second, some servers were paid their regular rates for all hours worked and did not receive any half-time premium for any hours worked over 40 in a workweek. Finally, servers that were paid for their overtime were paid at time and a half their cash wage instead of time and a half the minimum wage less the tip credit claimed.

d. Section 211: I found recordkeeping violations for failure to display the FLSA poster and failure to maintain accurate records. Defendants did not have any time records, nor could they produce complete records of cash payments to back-of-the-house workers.

9. On July 18, 2023, I held a conference with Shabani and detailed my investigative findings. I explained Defendants are subject to the FLSA, and I explained each violation in detail. I also reviewed the relevant DOL fact sheets and provided Shabani copies of the relevant portions of the Code of Federal Regulations. I also advised Shabani that civil money penalties would be assessed against Defendants.

10. Based on documents and information gathered during the investigation, I computed that Defendants owed back wages in the amount of $225,070.20 to 44 current and former

employees, plus an equal amount in liquidated damages for the period of February 22, 2021 through February 19, 2023 (the "Investigation Period").

Defendants' Retaliation and Threatened Kickbacks

11. On January 19, 2024, I spoke with a current Friendship employee ("Employee 1"), who called to tell me what was going on at the diner. Employee 1 stated that Shabani told all the servers that he was bringing in his attorney to talk to everyone the following week. According to Employee 1, Shabani stated the servers were all supposed to tell the attorney that the tip pool was voluntary, and that Shabani never threatened to take days away from anyone if they would not participate. Employee 1 stated that they are afraid to speak up and tell the truth, but they also did not want to lie and have to change their story in front of a judge.

12. On January 25, 2024, Employee 1 texted me and asked for direction. Employee 1 told me they felt pressured by Shabani to speak with his attorney and write a note stating the tip pool was voluntary.

13. On January 26, 2024, Employee 1 called me and stated that there were six servers who wrote notes stating the tip pool was voluntary and, to Employee 1's understanding, all of them had been offered financial incentives in exchange for writing it. According to Employee 1, Shabani told the servers that he believed if they all wrote notes stating the tip pool was voluntary, this case would just go away.

14. On January 30, 2024, Employee 1 told me Shabani had talked daily over the previous weekend to servers about the need for them to write letters stating the tip pool was voluntary. Employee 1 stated they received phone calls at home from Shabani asking Employee 1 to sign a letter stating the tip pool was voluntary, and Shabani later offered financial incentives for Employee 1 to sign a letter. Employee 1 also received text messages from Shabani and his wife that made Employee 1 feel pressured to write a letter on Defendants' behalf. Employee 1 also reported that

another employee said they heard Shabani talking about how he would have servers who did not sign letters on his behalf drug tested or breathalyzed, presumably to fire them.

15. On January 31, 2024, Employee 1 texted me that they were afraid Shabani was going to "do something" to them if Shabani knew Employee 1 had provided information to me. Employee 1 expressed fear for their physical safety. Employee 1 stated Shabani said he thought about asking a former employee to write a letter stating the tip pool was voluntary and hiring the former employee back if they did so.

16. On February 5, 2024, Employee 1 again texted me to state that over the weekend, Shabani had followed them around the restaurant and repeatedly asked them to write a letter. Employee 1 stated the workplace was so hostile, they felt they had to write the letter so nothing would happen to them.

17. On February 9, 2024, WHD sent notices to 44 current and former Friendship employees for whom they had addresses advising them of their rights under the FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3). (Exhibit A).

18. On February 9, 2024, WHD sent Shabani's attorney a letter requesting Defendants cease and desist any retaliatory conduct or any attempts to circumvent the government informer's privilege. (Exhibit B).

19. On February 13, 2024, I spoke with one of Defendants' current employees ("Employee 2"). Employee 2 stated that Shabani threatened to take a day of work away from people who would not write letters stating the tip pool was voluntary. Employee 2 also stated that Shabani seats guests now and can assign servers who would not write letters that the tip pool was voluntary a bad section or seat fewer people in their section, so they do not make as much money. Employee 2 also stated Shabani had been texting people at night pressuring them to write letters for him. Employee 2 stated after Shabani's lawyer told him the Labor Department called the attorney about

threatening people, Shabani keeps asking people if they are "the rat" or if they called the Labor Department and follows servers around at work, watching them all the time. Employee 2 did not want Shabani to know that they spoke to me.

20. On February 13, 2024, I spoke with another current employee of Friendship ("Employee 3"). Employee 3 stated all the servers were pressured to write letters stating that tip sharing was optional, and a lot of the servers who wrote letters were given incentives to do so. Employee 3 told me Shabani told servers the Labor Department called his attorney and said that he had threatened to reduce servers' schedules to four days if they did not write letters for him. Employee 3 reported Shabani created a very hostile work environment recently. Employee 3 also stated that they refused to sign a letter stating the tip pool was voluntary and, since then, had been told that Shabani was looking for any reason to fire Employee 3. Employee 3 told me Shabani told back-of-the-house workers that if they get any money, it is his money, and they have to give it back to him. Employee 3 also said Shabani told the servers the same thing: that the money was his. Employee 3 thought there were back-of-the-house workers who were likely to return any back wages to Shabani because they would feel like they owe it to him. Employee 3 did not want Shabani to know they spoke with me.

21. Defendants' actions severely decrease the likelihood that other employees will cooperate with WHD and/or accept any back wages found due.

Date: _____

CHRISTOPHER HUBER
Digitally signed by CHRISTOPHER HUBER
Date: 2024.03.04 14:30:52 -06'00'

_____
Christopher Huber
Investigator, Wage and Hour Division

EXHIBIT A

UNITED STATES DEPARTMENT OF LABOR
Wage and Hour Division
Indianapolis District Office
Telephone/Fax-317-808-7934

WHD
WAGE AND HOUR DIVISION

NOTICE TO CURRENT AND FORMER EMPLOYEES

The Department of Labor has been investigating potential violations of the Fair Labor Standards Act (FLSA) committed by **Friendship Diner (and its owner)**.

Some workers may be owed back wages for work performed between February 22, 2021, through February 19, 2023 (this is the time period the U.S. Department of Labor's investigation covered). **You may call Wage and Hour Investigator Chris Huber at 812-760-0370** to find out more information or to learn about your rights under the FLSA.

Under the FLSA, Friendship Diner and Bardhyl Shabani may NOT threaten to retaliate against you in any way if you participate or participated in the U.S. Department of Labor's investigation.

You are protected by the FLSA and have the right to participate freely in the U.S. Department of Labor's investigation into your employer's pay practices. You have the right to speak freely with investigators or other officials from the Department of Labor. Your employer is prohibited from retaliating against you in any way, including by terminating you, reporting you to immigration, or threatening to do any of these things because you spoke with the Department of Labor or because you refused to return any money paid to you as part of a settlement with the Department of Labor.

If you have any questions or concerns about minimum wage, overtime, the payment of back wages, the payment of current wages, or about your rights under the FLSA, **please call the Wage and Hour Investigator Chris Huber at 812-760-0370.** Your name will be kept confidential.

EXHIBIT B

UNITED STATES DEPARTMENT OF LABOR
Wage and Hour Division
Indianapolis District Office
Telephone/Fax-317-808-7934

WAGE AND HOUR DIVISION

February 9, 2024

Joshua B. Gessling
Kahn Dees Donovan & Kahn LLP
501 Main Street, Suite 305
P.O. Box 3646
Evansville, Indiana 47735-3646
jgessling@kddk.com

Re: Friendship Diner, LLC & Bardhyl Shabani
Wage and Hour Division Investigation No. 1974885

Dear Mr. Gessling,

As you are aware, the Wage and Hour Division is conducting an investigation under the Fair Labor Standards Act of 1938, as amended ("FLSA"), 29 U.S.C. § 201, *et seq*.

A. The FLSA's Anti-Retaliation Provision Applies

It has come to our attention there has been possible retaliation against employees who are believed to have exercised their right to share information with the representatives of the U.S. Department of Labor's Wage and Hour Division. Under the FLSA, it is unlawful "for any person . . . to discharge *or in any other manner* discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any [FLSA] proceeding . . . or has testified or is about to testify in any such proceeding." 29 U.S.C. § 215(a)(3) (emphasis added). Employees are protected from retaliation regardless of whether the complaint is made orally or in writing.

As the Supreme Court has repeatedly noted, the FLSA's anti-retaliation provision (29 U.S.C. § 215(a)(3)) effectuates the FLSA's enforcement scheme "by preventing 'fear of economic retaliation' from inducing workers 'quietly to accept substandard conditions.'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11–12 (2011) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). "Adverse action" is defined broadly to include any act that "well might have dissuaded a reasonable worker from making or supporting" a claim of a violation of the FLSA. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). *See also [Sec'y of*

Labor Eugene] Scalia v. F.W. Webb Co., No. 20-CV-11450-ADB, 2021 WL 1565508, at *3 (D. Mass. Apr. 21, 2021) (impermissible for an employer to act in a manner that would dissuade a reasonable employee from exercising their rights, including their rights to participate in an investigation, under the FLSA).

Complaints and communications made to the Wage and Hour Division are protected, and internal complaints to an employer are also protected. Because section 15(a)(3) prohibits "any person" from retaliating "against any employee," it follows that a "person" or an entity does not need to be an employer in order to violate section 15(a)(3), and that the employee who filed a complaint or engaged in any other protected activity does not need to be an employee of that "person." For example, courts have found an employer's agent, such as an employer's outside counsel, to be liable for retaliation under FLSA § 15(a)(3). *See Arias v. Raimondo*, 860 F.3d 1185, 1187–88, 1192 (9th Cir. 2017). The purpose of FLSA § 15(a)(3), as recognized in the *Arias* case, which involved attorney-driven FLSA retaliation, "is to enable workers to avail themselves of their statutory rights in court by invoking the legal process designed by Congress to protect them." *Arias*, 860 F.3d at 1190.

Section 15(a)(3) may also apply in situations where there is no current employment relationship between the parties, for example, protecting an employee from retaliation by a former employer. Any employee who is "discharged or in any other manner discriminated against" because, for instance, they filed a complaint or cooperated in an investigation, may file a retaliation complaint with the Wage and Hour Division or may file a private cause of action seeking appropriate remedies including, but not limited to, employment, reinstatement, injunctive relief, lost wages, and an additional equal amount as liquidated damages. Further, employers who willfully violate the FLSA may be prosecuted criminally and fined, imprisoned for not more than six months, or both. *See* 29 U.S.C. §§ 215(a)(3) and 216.

As it relates to the present investigation, possible retaliation could include, but is not limited to, the following actions resulting from employees' protected activities: terminating employees; removing employees from scheduled shifts; threatening employees; directing employees not to speak with representatives, including counsel, of the Wage and Hour Division; soliciting or obtaining declarations from employees under coercive circumstances; or any other act that "well might have dissuaded a reasonable worker from making or supporting" a claim of a violation of the FLSA. *Burlington N.*, 548 U.S. at 68.

To the extent any retaliation is occurring or has occurred, we request Friendship Diner, LLC, and Bardhyl Shabani immediately cease and desist. The Wage and Hour Division will investigate and seek to remedy (to the maximum extent allowed under the law) all instances of threats and retaliation, including by working in conjunction with the undersigned to seek immediate injunctive relief if necessary.

B. The Government Informer's Privilege Applies

In addition to the FLSA's anti-retaliation provision, to the extent any of Friendship Diner, LLC's current or former employees provided information to the Wage and Hour Division, the government informer's privilege applies. The privilege authorizes agencies of the United States Government to withhold from disclosure the identity of persons furnishing information on violations of the law to law-enforcement officials. *See, e.g., Roviaro v. United States*, 353 U.S. 53 (1957); *Brennan v. Eng'd Prods., Inc.*, 506 F.2d 299 (8th Cir. 1974); *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 351 F.2d 762 (D.C. Cir. 1965); *Dole v. Local 1492, IBEW*, 870 F.2d 368, 372 (7th Cir. 1989) (government is not required to meet a threshold showing reprisal or retaliation); *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (balancing competing interests); Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959); *Solis v. Saraphino's, Inc.*, 2010 WL 4941953 (E.D. Wisc. Nov. 30, 2010); *Guzman v. City of Chicago*, 242 F.R.D. 443 (N.D. Ill. 2007); *Culinary Foods, Inc. v. Raychem Corp.*, 150 F.R.D. 122 (N.D. Ill. 1993) (holding employee statements protected from disclosure under the informer's privilege); *Secretary of Labor v. Superior Care, Inc.*, 107 F.R.D. 395 (E.D.N.Y. 1985); *see, generally*, 8 Wright & Miller, FEDERAL PRACTICE & PROCEDURE ¶ 2019 (1970). "The informant privilege covers both the informant's identity and the contents of his communications with the government if those contents tend to reveal the informant's identity." *United States v. Herrero*, 893 F.2d 1512, 1525 (7th Cir. 1990) (citing *Roviaro*, 353 U.S. at 60).

"The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *Overby v. U.S. Fid. & Guar. Co.*, 224 F.2d 158, 163 (5th Cir. 1955) (citing *United States v. Reynolds*, 345 U.S. 1, 8 (1953)). Indeed, the "informant's privilege . . . prohibits [an employer] from inquiry related to the employees' contact with DOL investigators." *Martin v. Albany Bus. Journal, Inc.*, 780 F. Supp. 927, 940 (N.D.N.Y. 1992) (rejecting employer's attempt to obtain statements from employees who spoke to the Department of Labor simply because the employer learned which employees provided statements) (citing *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972)). While only the government may assert the privilege, the privilege applies to the protected information, regardless of who possesses such information. *Roviaro*, 353 U.S. at 59; *Harleysville Insurance Company*, 2017 WL 4368617, at *11; *J.R. Sousa & Sons, Inc.*, 113 F.R.D. 546, 548 (D. Mass. 1986); *see, e.g.*, Fed. R. Civ. P. 45(e)(2)(B).

Thus, an employer cannot "work around" the privilege by seeking the privileged information from a non-governmental source. The information is privileged regardless of who possesses it – including the informants themselves. *See J.R. Sousa & Sons, Inc.*, 113 F.R.D. at 547-48 (holding that because Secretary of Labor appropriately invoked the informer's privilege, defendants could not ask employees whether or not they provided information to the Secretary of Labor at a deposition); *see also U.S. Fid. & Guar. Co.*, 224 F.2d at 162 (allowing Secretary of the Treasury to invoke privilege in light of requests that a bank produce correspondence between the bank and federal banking officials); *Albany Bus. Journal, Inc.*, 780 F. Supp. at 940 (noting "the Government has the authority to invoke the privilege, even at third-party depositions" because the informer's privilege "prohibits inquiry related to the [potential informers']

contact with [Department of Labor] investigators.").

To the extent Friendship Diner, LLC has attempted to circumvent this privilege, we request that it immediately cease and desist.

C. Conclusion

Friendship Diner, LLC, including all of its agents and representatives, must cease from any retaliation. Please be advised that the Acting Secretary will vigorously enforce the protections against retaliation and discrimination for current and former employees if such actions become necessary.

Because of the serious concerns addressed in this letter, we request Friendship Diner, LLC post the two enclosed documents in a conspicuous location at all its establishments no later than seven days from today's date: Fact Sheet # 77A, "Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA)" and Field Assistance Bulletin No. 2022-02, "Protecting Workers from Retaliation." Please provide written confirmation of such postings on or before February 12, 2024. Thank you in advance for your cooperation in ensuring Friendship Diner, LLC's employees are aware of their statutory rights under the FLSA.

Please let us know if you have any questions. Thank you for your attention to these matters.

Sincerely,

AARON LOOMIS Digitally signed by AARON LOOMIS

Aaron Loomis
District Director

Enclosures

cc: Trial Attorney Haley R. Jenkins, Office of the Solicitor (via email)

EXHIBIT 2

You are protected by the Fair Labor Standards Act and have the right to participate freely in the U.S. Department of Labor's investigation and litigation. You have the right to speak freely with investigators, attorneys, or other officials from the Department of Labor. It is illegal for your employer to fire you, withhold wages, reduce your wages or your hours, threaten to call immigration authorities, or otherwise retaliate against you for speaking to the Department of Labor or testifying as a witness in this matter. All employees have the right to be lawfully paid for the work they perform, regardless of race, ethnicity, or immigration status.

The U.S. District Court for the Southern District of Indiana has ordered Friendship Diner, LLC, Bardhyl Shabani, and anyone acting on their behalf, to cease coercing, retaliating against, threatening to retaliate against, intimidating, or attempting to influence or in any way threatening employees for providing information to the Department of Labor.