

No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re THOMAS E. PEREZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

SEAFOOD PEDDLER OF SAN RAFAEL, INC., dba SEAFOOD
PEDDLER, a corporation, ALPHONSE SILVESTRI, an individual,
RICHARD MAYFIELD, an individual, and FIDEL CHACON, an individual,
Real Parties in Interest.

From the United States District Court
for the Northern District of California
No. CV-12-0116-WHO

PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

In this action brought by the Secretary of Labor (“Secretary”) under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. 201 *et seq.*, against Seafood Peddler of San Rafael, Inc., Alphonse Silvestri, Richard Mayfield, and Fidel Chacon (collectively “Seafood Peddler”), Seafood Peddler has not and cannot show a substantial need to know the identities of confidential employee informants during discovery sufficient to overcome the government’s strong interest in continuing to provide the protections of the government’s informant’s privilege.

Seafood Peddler already has access to the information that is relevant to the FLSA violations alleged. The identities of the confidential employee informants who gave information to the Department of Labor (“Department”) is in no way relevant to proving or disproving whether Seafood Peddler properly paid its employees. The district court (whose orders of October 2 and 4, 2013 from the basis of the Secretary’s petition) erred in concluding that Seafood Peddler’s need to know the identities of the confidential employee informants for purposes of impeachment warrants ordering disclosure of that information during discovery. When the purpose of knowing informants’ identities is for impeachment, that does not alter the conclusion that that information need not be disclosed until shortly before trial.

The district court similarly erred in concluding that former employees' interest in anonymity as confidential informants is weaker than that of current employees. This is particularly true in a case such as this where there is a real palpable danger of harassment and intimidation by Seafood Peddler of the employees, current or former, who gave information to the Department regarding Seafood Peddler's pay practices. Disclosure of the confidential employee informants' identities four months before the close of discovery and nearly eleven months before trial as the district court ordered here, rather than shortly before trial when the parties exchange witness lists, would expose the Secretary's confidential employee informants to additional time during which they could be subjected to retaliation, potentially dissuading them from testifying and undermining the Secretary's ability to enforce the FLSA.

ISSUE PRESENTED

Whether a petition for a writ of mandamus is warranted where the district court ordered the Secretary to disclose during discovery the identities of confidential employee informants whom the Secretary potentially intends to call as witnesses at trial, thereby exposing them to possible retaliation by Seafood Peddler and undermining the government's informant's privilege.

RELIEF SOUGHT

The Secretary petitions this Court for a writ of mandamus directing the district court: (1) to vacate its order compelling the Secretary to disclose the confidential employee informants' identities during discovery; and (2) to issue a protective order to prevent the disclosure of the identities of the informants until, at the earliest, the pretrial exchange of witness lists.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

1. This case involves immigrant employees who worked in the kitchen at Seafood Peddler washing dishes or preparing meals, typically at least 60 hours per week, without receiving an overtime premium. Dkt. 1 at ¶ 7. In 2011, the Department's Wage and Hour Division ("Wage and Hour") investigated the pay practices of Seafood Peddler in response to a complaint by a former Seafood Peddler employee. Wage and Hour found that Seafood Peddler employees were repeatedly subjected to threats of deportation. Seafood Peddler concealed employees from Wage and Hour personnel inspecting the restaurant by telling them that "Immigration" had arrived. After Wage and Hour's investigation began, Seafood Peddler retaliated against those they suspected of cooperating, threatening them with physical harm and ultimately firing eight employees. Dkt. No. 57-1.

2. On January 6, 2012, the Secretary filed a complaint in the District Court for the Northern District of California against Seafood Peddler alleging violations

of the FLSA. *See* 29 U.S.C. 216(c). The Secretary alleged that Seafood Peddler failed to pay overtime premiums to fourteen kitchen employees, fired eight employees in retaliation for the employees' exercising their rights under the FLSA, and failed to keep accurate records of hours worked. Dkt. 1 at ¶¶ 7-9 and Ex. A. Some of the fourteen kitchen employees that Wage and Hour identified as being due back wages gave statements to, or responded to questionnaires from, Wage and Hour before the filing of the Secretary's Complaint concerning Seafood Peddler's pay practices and the hours they worked. Additional employees, not employed in the kitchen, gave statements or completed questionnaires, including their observations regarding the kitchen employees' hours worked.¹ During discovery, the Secretary produced all employee statements and questionnaires that Wage and Hour gathered, other documents that the employees provided to the Secretary, the Department's own surveillance data, and notes by Department officials. Amended Initial Disclosures (May 14, 2012); Transmittal Letter (May 18, 2012); Pl's Resps. to Defs. Seafood Peddler's First Set of Interrogs. (Dec. 7,

¹ The Seafood Peddler restaurant in San Rafael closed in January 2012, Joint Case Mgmt. Stmt., Dkt. No. 122 at 4, but the individual defendants are operating another restaurant in the same geographic area (Sausalito) also called "Seafood Peddler." Chacon Depo. at 19-20, 153-54. In the order from which the Secretary seeks relief, the district court found that the Secretary's confidential employee informants are not currently employed by any of the defendants; there is, however, no basis for that finding in the record. It is possible that some of the non-party confidential employee informants who previously worked at the San Rafael restaurant work at the Sausalito restaurant.

2012); Pl's Ltr. to Defs. (Jan. 9, 2013) (referencing disclosures in 2012 on October 21, November 22, and December 19); Pl's Supplemental Resps. to Def's Seafood Peddler's First Set of Interrogs. (Jan. 24, 2013). All of these documents were redacted to protect the identity of those employees who provided information to the Secretary.

In response to the Secretary's request for a protective order, Dkt. No. 43, Magistrate Judge Nathanael Cousins entered an order on September 24, 2012 prohibiting Seafood Peddler from asking any witness during a deposition about the content of any communication with the Department. Dkt. No. 51.² Seafood Peddler moved for relief from that order with the presiding district court judge, Phyllis J. Hamilton, and sought to compel the Secretary to disclose during discovery the identities of confidential informants. Dkt. Nos. 56, 80.

3. On December 4, 2012, Judge Hamilton stated that the confidential informant's privilege applied to protect the identities of employees who gave information to the Secretary's investigators, "agree[ing] with [the Secretary] that even former employees may be subject to retaliation by their former employer and are therefore deserving of the privilege's protections." Dkt. No. 81 at 3. The court further stated, however, that certain factors warranted limiting the scope of the

² Pursuant to Magistrate Judge Cousins' order of September 19, 2012, Dkt. No. 49, the Secretary submitted unredacted informant statements for *in camera* review, resulting in the Magistrate Judge's order of October 16, 2012, denying Seafood Peddler's motion to compel production of informants' statements. Dkt. No. 61.

privilege. *Id.* Because the Secretary “ha[d] not provided any specific evidence (even by anonymous declaration) of such retaliation,” the court opined, no real harm would be suffered if the informants’ identities were disclosed before the end of discovery. *Id.*

On December 14, 2012, the Secretary moved to certify the order for interlocutory appeal under 28 U.S.C. 1292(b), arguing in part that the district court’s order conflicted with case law upholding the Secretary’s privilege not to reveal during the discovery phase of litigation the identities of individuals who communicated with him during an investigation. Dkt. No. 83. After hearing argument on February 20, 2013 on the Secretary’s motion, Dkt. No. 90, the district court denied the motion on March 29, 2013. Dkt. No. 92. Without setting a trial date, Judge Hamilton stated that because the Secretary had agreed that he would disclose identifying information for the confidential employee informants in his pre-trial witness list, and “concedes that, if defendants then wish to depose those employees, it [sic] may do so” at that time, it would be “more efficient to order disclosure of all identifying information before the close of discovery, so that defendants may take all depositions that they believe are necessary to defend themselves at trial.” *Id.* at 2. The court therefore ordered the Secretary to disclose the confidential employee informants’ identities by August 20, 2013, and reset the close of discovery four months subsequent to that date, on December 20, 2013. *Id.*

4. On June 6, 2013, Seafood Peddler subpoenaed the current supervisor of former Seafood Peddler employee Hector Hernandez, demanding Hernandez's entire personnel file and information relating to any potential U-visa application. Dkt. No. 100.³ In support of the Secretary's motion to quash the subpoena, the Secretary filed a declaration from Hernandez stating that he believed that the subpoena was an effort to retaliate against him because he was one of the fourteen employees named in the Secretary's complaint to whom back wages were owed. Dkt. No. 108. Hernandez further stated that he was "very worried" that the subpoena would jeopardize his job, and that Seafood Peddler would take other action in the future to "try to intimidate, harass or harm" him and his family. *Id.* at

3. Magistrate Judge Cousins quashed the subpoena's demands relating to Hernandez's immigration status and possible U-visa application, noting that "such discovery . . . raises concerns about possible retaliation" Dkt. No. 111 at 2.

5. Taking into account this stark demonstration of Seafood Peddler's intent to intimidate former employees and recognizing the particular harm that Seafood Peddler's subpoena caused to Hernandez—and in an effort to protect other confidential employee informants from that same harm—the Secretary moved on July 26, 2013 to extend the August 20, 2013 deadline to disclose the identity of the

³ U-visas are available to victims of a qualifying crime who are willing to cooperate with law enforcement in the investigation and prosecution of that crime. *See* 8 U.S.C. 1101(a)(15)(U).

confidential informants until shortly before trial. Dkt. No. 139 at 3. In support of this request, the Secretary submitted to the court for *in camera* review declarations from two other former employees showing that they risked their safety and livelihoods to provide information to the Secretary about Seafood Peddler's wage violations, suffered retaliation at the hands of Seafood Peddler for exercising their statutory rights, and continue to reasonably fear future retaliation if their identities were revealed. Dkt. Nos. 138, 160.⁴ These declarants stated that several of the individual defendants in this case threatened kitchen employees with physical violence and deportation if the employees ever talked to authorities about the restaurant's pay practices. *In Camera* Declarations (Exs. A and B). One of the declarants explained that, in light of Seafood Peddlers' recent subpoena to Hernandez's current supervisor, the declarant was fearful that if the declarant's identity is revealed, Seafood Peddler will try to talk with the declarant's current employer and get the declarant's immigration information, and the declarant worries that this action could threaten the declarant's livelihood. *In Camera* Declaration (Ex. A).

On September 10, 2013, Magistrate Judge Cousins denied the Secretary's request to extend the August 20 disclosure deadline, finding that the Secretary had

⁴ In conjunction with this Petition, the Secretary has filed a motion requesting that this Court accept for review these two *in camera* declarations. The two *in camera* declarations are attached to that motion.

“not presented any new material facts[,]” but nonetheless gave the Secretary until September 24, 2013 to disclose the confidential employee informants’ identities. Dkt. No. 162 at 2-3. As to the subpoena, Magistrate Judge Cousins reasoned that he had already limited the subpoena and “could grant appropriate relief against abusive subpoenas in the future if necessary.” *Id.* He further stated that the declarations “do not present evidence of a threat of retaliation that justifies an extension of the August 20 disclosure deadline.” *Id.* at 3.

6. On September 19, 2013, the Secretary moved for relief from Magistrate Judge Cousins’ order and sought an emergency stay of the September 24 disclosure deadline. Dkt. No. 168.⁵ On October 2, 2013, Judge Orrick denied the Secretary’s motion and ordered the Secretary to disclose the confidential employee informants’ identities within five days (i.e., by October 7, 2013). Dkt. 181. The court reasoned that “[t]he potential economic vulnerability of employees who worked for the defendants is mitigated by the fact that none currently work for the defendants[,]” and that any promises the confidential employee informants may have received with respect to their immigration status, while not directly relevant to the Secretary’s legal claims, “could bear on the credibility of the witnesses[,]” thereby entitling Seafood Peddler to such impeachment evidence during discovery.

⁵ On September 20, Judge William H. Orrick, to whom the case was transferred on June 27, 2013 from Judge Hamilton, issued an order delaying disclosure of the confidential employee informants’ identities “until further order of the Court.” Dkt. 172.

Id. at 4. The district court ordered that “[i]f any potential trial witness that the Secretary may call in its case in chief is or had been a confidential informant, the Secretary shall disclose his or her identity within five days” of the court’s order.

Id. The court set the close of discovery for February 18, 2014 (i.e., over four months from the date of the ordered disclosure); the summary judgment motions deadline for April 21, 2014; the pretrial conference for August 11, 2014; and the trial for August 25, 2014 (i.e., nearly eleven months from the date of the ordered disclosure).

7. On October 3, 2013, the Secretary moved to certify the court’s October 2 order for interlocutory appeal under 28 U.S.C. 1292(b) and moved to stay compliance with the October 2 order until the court ruled on the motion to certify. Dkt. Nos. 182, 183. On October 4, 2013, the court denied the motion to certify, but granted the motion to stay until the earlier of October 18, 2013 or the date on which this Court denies a stay. Dkt. No. 185. Judge Orrick noted that three judges, including himself, had already considered the Secretary’s arguments and that the Secretary had not presented any new evidence that justified further delaying the disclosure date. *Id.* at 2-4. The court also questioned the Secretary’s action in seeking an appeal when the confidential employee informants’ identities “will become known in the near term no matter what.” *Id.* at 4.

ARGUMENT

1. The All Writs Act, 28 U.S.C. 1651(a), permits courts “to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” The Supreme Court has described the writ of mandamus as an “extraordinary remedy” for “exceptional circumstances.” *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted). The Court noted, however, that while the preconditions to obtaining mandamus review are demanding, they are “not insuperable.” *Id.* at 381.

Indeed, the Supreme Court in *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009), specifically identified a writ of mandamus as a means of obtaining review of an injurious or novel privilege ruling. The Court noted that the writ of mandamus, along with appellate review pursuant to 28 U.S.C. 1292(b), “serve as useful safety valves for promptly correcting serious errors.” *Id.* at 111 (internal quotation marks omitted). It further stated that a party may petition for a writ of mandamus if the disclosure order is “a clear abuse of discretion, or otherwise works a manifest injustice.” *Id.* (internal quotation marks omitted).

This Court has “repeatedly exercised mandamus review when confronted with extraordinarily important questions of first impression concerning the scope of a privilege.” *Perry v. Schwarzenegger*, 591 F.3d 1147, 1154 (9th Cir. 2010). In *Perry*, the court granted a writ of mandamus to vacate a discovery order adverse to

the First Amendment privilege. *See id.* at 1152; *see also Hernandez v. Tanninen*, 604 F.3d 1095, 1100-02 (9th Cir. 2010) (mandamus review warranted to establish proper scope of waiver of attorney-client and work product privileges); *cf. Islamic Shura Council of S. Cal. v. F.B.I.*, 635 F.3d 1160, 1165-66 (9th Cir. 2011) (mandamus review warranted to vacate order making certain information public because it contained sensitive law enforcement and national security information that the government could properly withhold under the Freedom of Information Act); *Taiwan v. U.S. Dist. Court*, 128 F.3d 712, 719 (9th Cir. 1997) (mandamus review proper to correct ruling regarding testimonial immunity under the Taiwan Relations Act); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1296 (9th Cir. 1984) (mandamus review proper to reverse ruling that legislators can be deposed solely to determine their motives for enacting ordinances). Other circuits have concluded that mandamus review is appropriate in FLSA actions where the government's informant's privilege is at stake. *See Usery v. Ritter*, 547 F.2d 528, 532 (10th Cir. 1977); *United States v. Hemphill*, 369 F.2d 539, 541-42 (4th Cir. 1966).⁶

⁶ It does not appear that this Court has addressed the applicability of mandamus in an informant's privilege case under the FLSA or under any other federal statute. However, in response to the Secretary's petition for a writ of mandamus concerning the informant's privilege in a different FLSA case, the Court called for a response from the real-party-in-interest, the State of Washington, Department of Social and Health Services. *See Perez v. U.S. Dist. Court*, No. 13-72195 (order of Sept. 13, 2013).

2. In *Cheney*, the Supreme Court stated that “three conditions must be satisfied” before mandamus may issue: (1) there must be “no other adequate means to attain the relief” requested; (2) the party’s “right to issuance of the writ [must be] ‘clear and indisputable’”; and (3) the issuing court must be “satisfied that the writ is appropriate under the circumstances.” 542 U.S. at 380-381 (emphasis added). Numerous courts of appeals have since indicated that *Cheney*’s three conditions for mandamus are mandatory.⁷

This Court has continued to apply five factors to determine whether mandamus is appropriate: (1) the petitioner has no other adequate means, such as a direct appeal, to obtain the desired relief; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court’s order is clearly erroneous as a matter of law; (4) the district court’s order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court’s order raises new and important problems, or issues of first impression. *See Perry*, 591 F.3d at 1156 (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)).

The *Bauman* factors that this Court considers are consistent with the three-part mandamus standard in *Cheney*. The first two *Bauman* factors reflect *Cheney*’s requirement that there must be “no other adequate means to attain the relief”

⁷ *See, e.g., In re Bulger*, 710 F.3d 42, 45 (1st Cir. 2013) (Souter, J., sitting by designation); *United States v. Fast*, 709 F.3d 712, 718 (8th Cir. 2013).

requested, 542 U.S. at 380, which can turn on whether the petitioner would sustain harms that cannot be remedied on appeal. The third *Bauman* factor reflects the need for a “clear and indisputable” right to the writ. *Id.* at 381. The last two *Bauman* factors identify contexts in which a court can be “satisfied that the writ is appropriate under the circumstances.” *Id.* Indeed, other courts of appeals that follow *Bauman* have issued decisions indicating that *Bauman*’s five-factor test is consistent with the three *Cheney* factors. *See, e.g., In re Antrobus*, 519 F.3d 1123, 1130 (10th Cir. 2008).

3. Given the potentially dispositive nature of the clear error factor, that factor is addressed first. It is well settled that the informant’s privilege protects the identity of individuals who provide information to the government about violations of law. *See Roviario v. United States*, 353 U.S. 53, 59 (1957). As the Supreme Court explained in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960), the FLSA cannot be effectively enforced without employee cooperation, and such cooperation realistically cannot be expected without assurances of confidentiality. The underlying basis for the informant’s privilege is that the statutory provision prohibiting discrimination against employees who exercise their rights under the FLSA “has not always been thought an entirely sufficient sanction, for retribution can be subtle and cunning and difficult to prove.” *Hemphill*, 369 F.2d at 542. “The average employee involved in this type

of action is keenly aware of his dependence upon his employer's good will, not only to hold his job, but also for the necessary job references essential to employment elsewhere. Only by preserving their anonymity can the government obtain the information necessary to implement the law properly." *Brennan v. Engineered Prods. Inc.*, 506 F.2d 299, 303 (8th Cir. 1974). This Court has recognized that the informant's privilege applies to FLSA actions because "fear of employer reprisals will frequently chill employees' willingness to challenge employers' violations of their rights." *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1072-73 (9th Cir. 2000).

Nonetheless, the informant's privilege is not absolute. The Supreme Court in *Roviaro* established a balancing test, which requires a court to balance the public interest in efficient enforcement of the law and the employer's right to prepare a defense for trial. *See* 353 U.S. at 62. "[T]he interests to be balanced . . . are the public's interest in efficient enforcement of the [FLSA], the informer's right to be protected against possible retaliation, and the defendant's need to prepare for trial." *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 305 (5th Cir. 1972). The burden is on the employer to show a substantial need for the disclosure of the confidential employee informants' identities sufficient to overcome the privilege. *See United States v. Sanchez*, 908 F.2d 1443, 1451 (9th Cir. 1990). "The defendant's need for certain information is generally less weighty

during the discovery phase, as opposed to the pre-trial stage of the proceedings.”
Solis v. New China Buffet #8, Inc., No. 5:10-CV-78, 2011 WL 2610296, at *3
(M.D. Ga. July 1, 2011) (citing *Engineered Prods.*, 506 F.2d at 303; *Charles
Martin Inspectors*, 459 F.2d at 307).

a. While the government’s informant’s privilege is a qualified privilege, Seafood Peddler has not and cannot make the requisite showing of a substantial need to know the identities of the confidential employee informants during discovery that outweighs the Secretary’s strong interest in gathering information and protecting the confidential employee informants from possible retaliation. Ordering the Secretary to disclose the confidential employee informants’ identities four months before the close of discovery and nearly eleven months before trial effectively undermines the informant’s privilege. If informants’ identities are not protected during discovery and at least until the exchange of witness lists, the privilege serves little purpose in protecting informants from possible retaliation. The very real danger to the confidential employee informants in this case is made manifest by Seafood Peddler’s past intimidation of its employees, which includes threats of physical violence if those employees ever talked to authorities about the restaurant’s pay practices, together with its subpoenaing a former employee’s current employer.

Seafood Peddler's subpoena of former employee Hector Hernandez's current supervisor, asking for Hernandez's personnel file and documents relating to his immigration status, interfered with Hernandez's employment by calling to his employer's attention that he is involved in an FLSA case against his former employer and calling his immigration status into question in his current employment. In addition to interfering with Hernandez's employment, the subpoena was retaliatory because, as this Court recognizes, seeking information about an employee's immigration status (in this case, possible U-visa information) is in and of itself retaliatory.⁸ Even though Magistrate Judge Cousins quashed, in part, the subpoena of Hernandez's current supervisor, the mere act of serving the subpoena on a former employee's current employer could very well be sufficient to brand that former employee as a "troublemaker" and raise questions about the former employee's immigration status. At a minimum, it sends a strong message to Seafood Peddler's former employees that Seafood Peddler still has the power to retaliate against them. Further, in both *in camera* declarations, the declarants indicated that the individual defendants in this case said that if they ever found out who had complained to the Department, they would physically harm that person.

In Camera Declarations. Given Seafood Peddler's on-going effort to intimidate

⁸ See *Rivera v. NIBCO*, 364 F.3d 1057, 1065 (9th Cir. 2004) (prohibiting inquiry into immigration status in an employment case, where it has no relevance to the underlying claims, because of the profound chilling effect that these inquiries have on employees' ability to enforce their statutory rights).

former employees, the confidential employee informants have every reason to interpret Seafood Peddler's previous threats of physical retaliation to have renewed force.⁹

Under the district court's orders of October 2 and 4, 2013, this real danger facing the confidential employee informants will extend for a period of some eleven months, i.e., until the trial begins, and might very well have the consequence of dissuading those confidential employee informants from testifying at trial. The vulnerability of the confidential employee informants at the hands of Seafood Peddler for an extended period of time, with the possible attendant result of affecting the Secretary's ability to pursue the present action because of a loss of witnesses, as well as affecting the Secretary's enforcement of the FLSA generally, should not be countenanced.

In confronting this issue, courts have repeatedly concluded that the employer did not show a substantial need to know the informants' identities during discovery

⁹ While the Secretary does not necessarily agree with the district courts that have held that, as the trial draws near, the Secretary must make a particularized showing regarding the danger of retaliation for the privilege to continue, *see Solis v. Best Miracle Corp.*, No. SACV 08-0998-CHC, 2009 WL 3709498, at *2 (C.D. Cal. Nov. 3, 2009); *Chao v. Brumfield Constr.*, No. C07-821RSL, 2008 WL 1928984, at *3 (W.D. Wash. Apr. 28, 2008), Seafood Peddler's actions in subpoenaing Hernandez's current supervisor, combined with the previous threats of physical retaliation against any employee who talked with Department officials, constitute a particularized showing sufficient to extend the date to disclose the informants' identities to the pretrial exchange of witness lists. *See Best Miracle*, 2009 WL 3709498, at *2 (concluding the Secretary had made a particularized showing of harm based on, among other things, *in camera* declarations from employees).

sufficient to overcome the government's informant's privilege. *See, e.g., Brock v. Gingerbread House, Inc.*, 907 F.2d 115, 116-17 (10th Cir. 1989) (reversing district court because, absent a "substantial showing of need" at the discovery phase, the informant's privilege protects the identities of Department informants during discovery; ruling that "the pre-trial conference is the appropriate occasion generally for identification of witnesses"); *Brock v. R.J. Auto Parts & Serv., Inc.*, 864 F.2d 677, 678-89 (10th Cir. 1988) (reversing district court for requiring identification of Department witnesses in discovery before pretrial conference); *Engineered Prods.*, 506 F.2d 302-04 (reversing district court for ordering disclosure of Department witnesses in discovery when trial on FLSA claims was scheduled to begin in about three months; explaining that Department had already disclosed the "charges, dates, and names of underpaid employees" and that defendant failed to show need to overcome the privilege in discovery); *Charles Martin Inspectors*, 459 F.2d at 304, 307 (reversing district court because the Secretary had already identified the employees alleged to be underpaid, the periods in question, the hours worked, the rates paid, and the estimated amounts of underpayment, and the relevant facts were as much within the employer's knowledge as the employees); *Wirtz v. Continental Finance & Loan Co. of West End*, 326 F.2d 561, 564 (5th Cir. 1964) (reversing district court for ordering Department to reveal informants' identities during discovery in FLSA action;

explaining that the question of “who had informed on [the employer]” that would be answered by revealing “the names of informers are utterly irrelevant to the issues to be tried”; noting that “the pre-trial hearing [is] the appropriate time” “shortly before trial” for disclosing Department witnesses); *Wirtz v. B.A.C. Steel Prods., Inc.*, 312 F.2d 14, 15-16 (4th Cir. 1962) (reversing district court because the Secretary had already provided redacted witness statements and had listed all the persons who had knowledge about the alleged FLSA violations).¹⁰

Engineered Products is particularly instructive. The district court ordered the Secretary to produce unredacted statements of individuals interviewed by Department officials and Department investigative reports, but permitted the Secretary to withhold such information for any person who would not testify. *See* 506 F.2d at 302. The Eighth Circuit noted that the effect of the district court’s order “was to compel the Secretary to decide during discovery who his witnesses would be.” *Id.* The court concluded that the employer had not shown sufficient need for the information “so far in advance of trial,” which was less than three months away, and that the district court did not take “adequate notice of the

¹⁰ In *Wirtz v. Rosenthal*, 388 F.2d 290, 291 (9th Cir. 1967), this Court addressed the government informant’s privilege in an FLSA case in a very brief *per curiam* decision in which the Court concluded that the district court did not err in ruling that the employer had shown good cause in requiring production of information otherwise covered by the privilege. The decision provided essentially no analysis of the privilege; it merely noted that the district court had wide discretion in balancing the public interest in maintaining the privilege against the defendant’s need to obtain the information for a fair trial. *See id.*

difference between discovery and immediate pretrial stages.” *Id.* at 302-03. While the informant’s privilege is a qualified one and a district court may require disclosure of witnesses “a reasonable time” before trial, “[a] ‘reasonable time’ is to be measured by balancing the defendant’s need against the vulnerability of the employee witnesses to the defendant employer.” *Id.* at 304. The Eighth Circuit cautioned the district court “to take seriously the government’s reasons for desiring to withhold the statements as long as possible. The government’s counsel has asserted that the Secretary is constantly losing witnesses in FLSA actions, and that he wishes to limit the period of potential or even imagined harassment.” *Id.* at 305.

The district court’s orders here effectively compel the Secretary to decide who his witnesses may be and disclose their identities four months before the close of discovery and nearly eleven months before trial. The result is that the confidential employee informants would be exposed to potential retaliation for a greater period of time (i.e., eleven months) than would be the case if their identities were not disclosed until the pretrial exchange of witness lists. Compared to the three-month span of time between the ordered disclosure and the trial that the Eighth Circuit found to be too long in *Engineered Products*, the eleven months between the ordered disclosure and the trial in this case constitutes an even more egregious error. Thus, Judge Orrick’s statement that the confidential employee informants’ identities “will become known in the near term no matter what[,]”

Dkt. No. 185 at 4, with its implication that there is no difference between disclosing their identities now or just before trial, fails to take into account the very real potential of retaliation to which the confidential employee informants will be exposed over the next eleven months. The threat of such retaliation may well intimidate them to not testify at trial. Moreover, because it is too early in the litigation for the Secretary to determine with certainty who he will call as witnesses, some confidential employee informants disclosed now based upon the Secretary's best trial prediction may not be called to testify, thereby unnecessarily endangering them.

b. Equally significant is the fact that Seafood Peddler already has or has access to all the information relevant to the Secretary's FLSA claims against it. When the employer has independent means of gathering the relevant evidence for which it purportedly seeks the confidential informants' identities, the employer has not shown sufficient need for the information to overcome the privilege. *See Brock v. J.R. Sousa & Sons, Inc.*, 113 F.R.D. 545, 547 (D. Mass. 1986). As the employer, Seafood Peddler has access to its own employment records. Further, the Secretary has already provided Seafood Peddler with all the discoverable information in his possession that is relevant to the Secretary's overtime compensation, retaliation, and recordkeeping FLSA claims against Seafood Peddler, redacted as necessary to protect the identities of confidential informants.

This includes not only witness statements and questionnaires, but the Department's surveillance data and notes by Department officials, as well as Seafood Peddler's own payroll and timesheet records that are in the Secretary's possession. The only information that Seafood Peddler does not have is the names of the employees who gave information to the Department. "[T]he names of informers are irrelevant to whether the employer properly paid its employees and otherwise complied with the [FLSA's] requirements." *Chao v. Westside Drywall, Inc.*, 254 F.R.D. 651, 660 (D. Or. 2009); *see Continental Finance & Loan*, 326 F.2d at 563.

This case involves only fourteen former employees who are owed back wages as well as approximately 50 to 60 non-party former employees who could potentially serve as witnesses at trial. Seafood Peddler can depose these individuals about the alleged FLSA violations without knowing which individuals were informants and without asking about their communications with the Secretary or other Department officials.¹¹ The cost of taking additional depositions does not constitute a substantial need sufficient to overcome the informant's privilege. *See, e.g., Charles Martin Inspectors*, 459 F.2d at 30; *New China Buffet*, 2011 WL 2610296, at *3; *Best Miracle*, 2009 WL 3709498, at *3.

¹¹ There is also no basis for Seafood Peddler to ask such employees about their immigration status; their immigration status is irrelevant in proving or disproving the Secretary's FLSA claims against Seafood Peddler. As noted *supra*, such a line of inquiry is itself retaliatory. *See Rivera*, 364 F.3d at 1065.

The Tenth Circuit in *R.J. Auto Parts* noted that a district court is not powerless to compel production of a witness list during discovery, but before doing so, the moving party must show a particularized need, and the employer in that case had “failed to demonstrate the barest need[.]” 864 F.2d at 679. Similarly, here, Seafood Peddler has failed to demonstrate the barest need for this information given the nature of the action brought by the Secretary and the means Seafood Peddler has at its disposal to defend against such action without knowing the identities of the confidential employee informants.

c. In balancing the interests regarding the informant’s privilege, the court noted that Seafood Peddler asserted that information relating to promises the confidential employee informants may have received regarding their immigration status or other benefits they may have received because of their cooperation with the Secretary “could bear on the credibility of the witnesses.” Dkt. No. 181 at 4. Even though the court acknowledged that this information is not directly relevant to the Secretary’s FLSA claims, the court concluded that Seafood Peddler was entitled to this information, “including impeachment evidence,” during discovery and nearly eleven months before trial.

This was legal error. Indeed, in several cases, courts have specifically concluded that the employer’s “need” to know informants’ identities for the purpose of impeachment did not outweigh the government’s interest in

withholding the identities during discovery. Instead, information for impeachment purposes need not be disclosed until very close to the trial date. *See Engineered Prods.*, 506 F.2d at 304; *Charles Martin Inspectors*, 459 F.2d at 307. In *Engineered Products*, the Eighth Circuit stated that because the primary use of the identities of the informants appeared to be for impeachment purposes, disclosure of the names five to ten days before trial would “seem sufficient.” 506 F.2d at 304; *see Charles Martin Inspectors*, 459 F.2d at 307 (concluding that the employer’s claim that it needed the information for impeachment purposes “is a matter to be handled . . . at the pretrial stage of the proceedings[,]” not during discovery); *see also Dole v. Int’l Ass’n Managers, Inc.*, Civ. No. 90-0219PHX RCB, 1991 WL 270194, at *4 (D. Ariz. April 2, 1991).¹²

¹² To the extent that Judge Orrick adopted the reasoning in Judge Hamilton’s March 29, 2013 order, the Secretary notes that Judge Hamilton did not identify any specific need that Seafood Peddler had asserted as its basis for needing to know the confidential employee informants’ identities during discovery. Dkt. No. 92. Instead, she appeared to rely on statements by the Secretary’s counsel that if Seafood Peddler wished to depose the employee-informants that the Secretary identifies in his pre-trial witness list, Seafood Peddler may do so. *Id.* at 2. She appears to have then inferred from this that the Secretary consented to postponing the trial date to permit an extended period of time in which Seafood Peddler could take these depositions. The Secretary did not and does not so consent. The Secretary has, from early on, made clear that he will disclose the identities of the employee-informants who will testify at trial when the Secretary provides a witness list at the pretrial conference. Dkt. Nos. 77, 90 at 21:6-11. The Secretary did not state or otherwise concede, however, that he is willing to postpone the trial for further discovery once he has disclosed the informants’ identities. Indeed, doing so would result in disclosing the informants’ identities during discovery, which would effectively undermine the informant’s privilege.

d. Judge Orrick further erred in his October 2 order in concluding that the confidential employee informants' "potential economic vulnerability" is "mitigated" by the fact that they no longer work for Seafood Peddler. The district court's proposition finds no support in the case law. Indeed, the law is well-established, as recognized by Judge Hamilton, that the informants' privilege extends equally to former employees and to current employees. Dkt. No. 81 at 3. In *Charles Martin Inspectors*, the Fifth Circuit rejected this exact argument in concluding that the district court failed to properly balance the opposing interests. "The possibility of retaliation . . . is far from being 'remote and speculative' with respect to former employees." 459 F.2d at 306. Employers often require references from prior employers in making their hiring decisions; a former employee could be subject to retaliation by a new employer upon that new employer learning that the employee cooperated with the government in a wage and hour investigation; and there is the possibility that a former employee may seek reemployment with the former employer. *See id.* Thus, "[t]here is no ground for affording any less protection to defendant's former employees than to its present employees." *Id.*; *see New China Buffet*, 2011 WL 2610296, at *4 (rejecting argument that the possibility of retaliation against the informants was remote where the employees had not been employed by the employer for over twenty-one months and the employer's restaurant had closed); *Int'l Ass'n*

Managers, Inc., 1991 WL 270194, at *3 (concluding that the threat of retaliation exists for former employees when weighing the parties' respective interests concerning disclosure of informants' identities).

Here, the district court committed clear error in concluding that the fact that the confidential employee informants are former employees lessens their interest in having their identities protected.¹³ Indeed, this case illustrates the real intimidation to which former employees can be subjected. Seafood Peddler's action in subpoenaing former employee Hernandez's current employer and the three declarations discussed *supra* send the message to other employee-informants that Seafood Peddler still intends to harass and intimidate employees. Given defendants' previous threats of physical harm to whoever gave information to the Department about the restaurant's pay practices, it seems likely that Seafood Peddler would target its harassment particularly at the confidential employee informants as soon as it learns their identities. The district court erred by discounting the confidential employee informants' interest in retaining their anonymity on the basis of being former rather than current employees.

¹³ Interference with current employment can be retaliation under the FLSA. *See, e.g., Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977) (applying the FLSA's anti-retaliation provision to an employee who was denied a job after a former employer informed a prospective employer that the employee had filed a complaint with the Department); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1059 (N.D. Cal. 2002) (interfering with a former employee's subsequent employment is retaliation under the FLSA).

4. The first *Bauman* factor, that there are no other adequate means to obtain the desired relief, also supports mandamus. The district court denied the Secretary's motion for interlocutory review under 28 U.S.C. 1292(b). Dkt. No. 185. There are no other viable means to obtain review of the district court's errors and to protect the identities of government informants from disclosure. *See Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989). Moreover, there is an immediate need to resolve this issue. While the district court granted a stay of compliance with its October 2 order requiring the disclosure of the confidential employee informants' identities, it is clear from the district court's order that by the earlier of October 18, 2013 or the date on which the Court denies a stay, the court expects the Secretary to disclose the informants' identities.¹⁴

5. The second factor, that petitioner will be damaged or prejudiced in a way not correctable on appeal, further supports mandamus. This Court in *Perry* identified two considerations that support this factor: damage to the particular petitioner and substantial costs imposed on the public interest. *See* 591 F.3d at 1157-58. The Court concluded that the disclosure itself in *Perry* would injure the petitioners' First Amendment rights, and therefore "this injury will not be remediable on appeal." *Id.* at 1158. The same is true here. If the Secretary is compelled to disclose the confidential employee informants' identities, any later

¹⁴ Of course, if this Court grants a stay, the requirement to comply with the October 2 order would be obviated.

review of the erroneous discovery order will not undo the damage done because their identities will already be known. The cat will already be out of the bag.

Equally significant, the disclosure of the confidential employee informants' identities will impose a substantial cost on the public interest. In *Perry*, the Ninth Circuit noted that the chilling effect on public participation and debate resulting from the district court's "unduly narrow conception of the First Amendment privilege" would be substantial. 591 F.3d at 1158. The court concluded that such a risk "would imperil a substantial public interest or some particular value of a higher order." *Id.* at 1155 (quoting *Mohawk*, 558 U.S. at 106). Similarly, the district court's application of the informant's privilege, if left intact, would substantially hinder the Secretary's ability to enforce the FLSA's basic labor standards. The more time before trial that the confidential employee informants' identities are known, the more opportunity an employer has to retaliate against and intimidate those informants, with the added possible result that the informants will decide that they are not willing to testify.

6. The fifth factor, that the district court's order presents new and important problems or issues of first impression, is met.¹⁵ As highlighted *supra*, the district court's application of the government's informant's privilege is unsupported by the

¹⁵ "[T]he fourth and fifth [factors] will rarely be present at the same time." *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court*, 408 F.3d 1142, 1146 (9th Cir. 2005).

case law. Moreover, there is scant case law in the Ninth Circuit regarding the informant's privilege in FLSA cases, including the important issue of the proper time at which disclosure of the informants' identities may be warranted.¹⁶ Absent review through a writ of mandamus, this important issue "may repeatedly evade review because of the collateral nature of the discovery ruling." *Perry*, 591 F.3d at 1158-59 (fifth factor was satisfied for this reason).

CONCLUSION

For the foregoing reasons, this Court should grant the Secretary's petition for a writ of mandamus.

Respectfully submitted,

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¹⁶ The Ninth Circuit has discussed the informant's privilege, albeit indirectly, in an FLSA case only once, in *Does*. And, as noted *supra*, the court addressed the government informant's privilege in an FLSA case in a very brief *per curiam* decision in *Rosenthal*, 388 F.2d at 291.

STATEMENT OF RELATED CASES

Perez v. U.S. Dist. Court, 9th Cir. No. 13-72195 (informant's privilege in FLSA case).

CERTIFICATE OF SERVICE

I certify that copies of the Secretary of Labor's Petition for Writ of Mandamus were served on the following individuals on this 12th day of October, 2013 via delivery by the United Parcel Service:

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Because of the time sensitive nature of the petition, courtesy copies of the petition have been emailed on October 12, 2013 to Mark S. Mazer (mazer@bwmlaw.com), Mattaniah Eytan (office@eytanlaw.com), and the Honorable William H. Orrick (WHOpdf@cand.uscourts.gov).

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