

No. 13-2468-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS E. PEREZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner-Appellee,

v.

SUBCONTRACTING CONCEPTS, LLC,

Respondent-Appellant.

On Appeal from the United States District Court
for the Northern District of New York

RESPONSE BRIEF OF THE SECRETARY OF LABOR

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RESPONSE BRIEF OF THE SECRETARY OF LABOR

On behalf of the United States Department of Labor ("Department"), the Secretary of Labor ("Secretary") submits this brief in response to the brief filed by Subcontracting Concepts, LLC ("SCI").

JURISDICTIONAL STATEMENT

The Department's Wage and Hour Division ("Wage and Hour") enforces the Fair Labor Standards Act ("FLSA"), and it may conduct investigations, see 29 U.S.C. 211(a), and issue administrative subpoenas for the production of documents, see 29 U.S.C. 209 (granting the subpoena authority set forth in 15

U.S.C. 49). The Secretary filed an action against SCI in district court to enforce an administrative subpoena issued by Wage and Hour, over which the court had jurisdiction pursuant to 15 U.S.C. 49 (district courts may enforce subpoenas), 28 U.S.C. 1331 (district courts have federal question jurisdiction), and 28 U.S.C. 1345 (district courts have jurisdiction over actions commenced by United States agencies or officers thereof).

A Magistrate Judge enforced the administrative subpoena in relevant part by ordering SCI to produce its client list, but deferred deciding whether to order SCI to produce several other documents until further discovery was conducted. See JA 142-164.¹ The Magistrate Judge denied SCI's motion for reconsideration, see JA 203-215, and the District Court denied SCI's objections to the Magistrate Judge's decision in a May 23, 2013 Order, see JA 216-17. SCI filed a Notice of Appeal on June 21, 2013. See JA 218. Concerned that there was not yet a final judgment because the Magistrate Judge deferred deciding whether SCI must produce several documents sought by the subpoena, the Secretary asked the District Court for leave to withdraw his claims with respect to any documents whose production had not been ordered. See JA 227-29. In an August 8, 2013 Order, the District Court dismissed without prejudice the Secretary's

¹ "JA" refers to the parties' Joint Appendix, and the numbers that follow "JA" refer to pages of the Joint Appendix.

claims with respect to any documents whose production had not been ordered and directed that final judgment be entered *nunc pro tunc* as of May 23, 2013 with respect to those documents, including the client list, which the Magistrate Judge had ordered SCI to produce. See id. Final Judgment was accordingly entered *nunc pro tunc* as of May 23, 2013. See JA 230. SCI's June 21, 2013 Notice of Appeal was timely, and this Court has jurisdiction over the appeal pursuant to 28 U.S.C. 1291.²

STATEMENT OF THE ISSUES

1. Whether SCI's appeal should be dismissed given the District Court's determination that SCI's objections to the Magistrate Judge's decisions were untimely and given SCI's failure to challenge that determination on appeal.

2. Whether the District Court, in deciding the enforceability of Wage and Hour's administrative subpoena, abused its discretion by ordering SCI to produce its client list.

STATEMENT OF THE CASE

This is a subpoena enforcement action in which the Secretary sought to compel SCI to produce the documents

² "A district court order enforcing a subpoena issued by a government agency in connection with an administrative investigation may be appealed immediately without first performing the ritual of obtaining a contempt order." United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 469 (2d Cir. 1996).

identified in Wage and Hour's administrative subpoena issued as part of an investigation into FLSA compliance. The District Court enforced the subpoena in large part. Of the documents which SCI was ordered to produce, SCI refuses to produce its client list. On appeal, SCI attempts to justify its refusal to produce its client list on the grounds that Wage and Hour has no legitimate need for the list and the list constitutes a trade secret.

1. Statement of Facts

SCI describes itself as a "third party administrator" in the courier industry. JA 7, 67. It employs hundreds of drivers and classifies them as independent contractors. See JA 7-8. SCI refers the drivers to its clients, who are logistics and courier companies. See JA 7. The drivers provide their services (i.e., they drive) for SCI's clients. See JA 67-68. For its clients, SCI handles the drivers' payroll, issues tax forms to the drivers, makes insurance programs available to the drivers, and provides other "back-office administrative services" with respect to the drivers. JA 67-70. As a result of being classified as independent contractors, the drivers are not entitled to be paid minimum wage and overtime pursuant to the FLSA.

Wage and Hour commenced an investigation in February 2012 to determine whether classifying the drivers as independent

contractors violates the FLSA and whether SCI and its clients are the drivers' joint employers under the FLSA. See JA 7-8. SCI refused to provide relevant information to Wage and Hour, and in April 2012, Wage and Hour sent a Formal Records Request to SCI seeking certain documents, including its client list. See JA 8-10, 14-16. SCI objected to producing most of the documents, primarily on the grounds that "independent contractors are not subject to the provisions of [the] FLSA." JA 18-19. As a result of SCI's refusal to comply, Wage and Hour issued and served on SCI in May 2012 an administrative subpoena requesting production of the documents, including its client list. See JA 10, 21-24.³ In response to the subpoena, SCI produced some documents, objected to producing other documents, requested and was granted extensions of time to comply, and reasserted objections to producing certain documents. See JA 10-12, 26-54, 55-64. SCI never fully complied with the

³ SCI's assertion during the investigation and to the Magistrate Judge that the drivers are not covered by the FLSA is not a valid objection to the subpoena. "[A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party." Constr. Prods. Research, 73 F.3d at 470-71 (citing Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943)); see Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 214 (1946) (FLSA authorizes Wage and Hour in the first instance, and not the courts, to determine the question of coverage when investigating possible violations and authorizes Wage and Hour to exercise its subpoena power to secure evidence bearing on the coverage determination).

subpoena, see JA 12, and the Department's Office of the Solicitor determined by December 2012 that further efforts to obtain SCI's compliance with the subpoena were unlikely to succeed, see JA 55-56.⁴

2. Procedural History and Rulings Below

The Secretary commenced a subpoena enforcement action against SCI in the United States District Court for the Northern District of New York and moved the court to compel SCI to produce the requested documents. See JA 5-6.

In a February 11, 2013 Memorandum-Decision and Order, a Magistrate Judge granted the motion in large part and ordered SCI to produce a number of documents. See JA 142-164. The Magistrate Judge deferred deciding whether to compel SCI to produce certain other documents until after the Secretary conducted further discovery. See id. With respect to SCI's client list, the Magistrate Judge rejected SCI's argument that Wage and Hour has no legitimate need for the identities of its clients. The Magistrate Judge noted that the investigation seeks to determine whether the drivers are properly classified as independent contractors and whether SCI and its clients (the

⁴ Any characterization by SCI that it cooperated with the investigation is contrary to the Magistrate Judge's findings that SCI "launched remonstrations to much of the requested information," JA 146, "lodged a rather extensive list of objections," id., and "only partially complied" with the subpoena, JA 147.

logistics and courier companies) are joint employers. See JA 149-150. According to the Magistrate Judge, "[i]t is incontestable that DOL has the legitimate authority to investigate 'joint-employer' relationships as it intends to do so with this Subpoena." JA 150. The Magistrate Judge reiterated that determining whether SCI or its clients are the employers of the drivers or their joint employers "is indeed a legitimate basis for DOL to explore." JA 159.

The Magistrate Judge questioned SCI's argument that its client list is confidential, finding it unclear whether that was the case. See JA 160-61. According to the Magistrate Judge, "[o]ther than conclusory statements that its client list is 'carefully guarded,' [SCI] has not outlined in any detail how it protects or guards its customer lists, except in one particular situation." JA 160. Noting that Wage and Hour simply sought the names and addresses of SCI's clients, the Magistrate Judge ordered SCI to produce them "with the understanding that DOL is not to publish, disclose, nor reveal this list to any third party outside the context of any prospective litigation." JA 161.⁵

⁵ The Magistrate Judge indicated that, "[s]hould DOL in conducting its investigation reach out to any of the clients so listed, it is permitted to advise that particular client how it came to learn its name and professional relationship with [SCI]." JA 161.

SCI filed a motion for reconsideration alleging that it had just discovered that Wage and Hour's investigation was based solely on a complaint by a single driver, Milton Greene ("Mr. Greene"). See JA 206-09. SCI believed that a single complaint was insufficient for Wage and Hour to investigate its business operations generally, and it asserted that Wage and Hour kept it and the Magistrate Judge "'in the dark as to the real basis for its investigation'" and that this "'vital piece of evidence'" would have affected the Magistrate Judge's ruling on the subpoena. JA 208 (quoting SCI's Memorandum of Law). In a March 11, 2013 Memorandum-Decision and Order, the Magistrate Judge disagreed, stating that knowledge of Mr. Greene's complaint was "an abstract or obtuse fact having no purposeful bearing on [the ruling]." JA 209-210. The Magistrate Judge refused to subscribe to SCI's "myopic view that a single complaint legally impedes DOL from conducting a much . . . broader investigation" because doing so "would require a tremendous leap in logic." JA 210. He referred to Wage and Hour's ongoing investigation of Zion Delivery Services, an SCI client, and concluded that SCI "knows full well, or should know, that this investigation does not rest solely on Mr. Greene's complaint alone" and that "[t]o argue otherwise is pure obfuscation." Id. The Magistrate Judge concluded that SCI's "newly discovered evidence" had no

significance and was of "minute importance," and that its motion for reconsideration had "no legitimate basis." JA 211.⁶

Additionally, the Magistrate Judge rejected as "baseless" and "superfluous" SCI's request to impose more restrictions on Wage and Hour's use of the client list. JA 214. The Magistrate Judge was confident that Wage and Hour understood the order restricting it from disclosing SCI's client list and the consequences of failing to abide by that order. See id. According to the Magistrate Judge, "to surmise [as SCI did] that a party will breach such an order is presumptuous and unfounded." Id.

Sixteen days after the Magistrate Judge denied its motion for reconsideration, SCI filed objections with the District Court. See JA 3, 216-17. The District Court ruled that SCI's objections were untimely. See JA 217 (citing 28 U.S.C. 636(b)(1) & Fed. R. Civ. P. 72, which both set a 14-day deadline for filing objections). The District Court alternatively ruled that the Magistrate Judge's denial of the motion for reconsideration was "detailed and well-reasoned" and "not in any

⁶ The Magistrate Judge concluded that SCI had ulterior motives for filing the motion for reconsideration. See JA 211-12. He characterized the motion as "nothing more than a veiled attempt to overcome previous deficiencies and to plug in information [SCI] failed to reveal earlier." JA 212. The Magistrate Judge found the motion to be an attempt by SCI to rectify deficiencies in its argument that its client list is a trade secret and to reargue issues that should have been fully addressed during the Secretary's motion to compel. See id.

manner clearly erroneous or contrary to law." Id. SCI's Notice of Appeal seeks review of the District Court's denial of its objections to the Magistrate Judge's decisions as well as those decisions themselves. See JA 218.

SUMMARY OF ARGUMENT

1. SCI's untimely objections to the Magistrate Judge's decisions and its failure to make any argument on appeal that its objections were timely are grounds for dismissing the appeal. SCI's failure to file timely objections with the District Court waived any appellate review of the Magistrate Judge's decisions. Timely objections to a magistrate judge's decision are required to preserve appellate review of that decision. This Court should apply the waiver rule even if SCI did not have clear notice that a consequence of its failure to file timely objections to the Magistrate Judge's decisions would be a waiver of appellate review. And there is no interest of justice that excuses applying the waiver rule in this case.

Moreover, on appeal, SCI failed in its opening brief to challenge the District Court's determination that its objections were untimely – one of the independent bases for the District Court's denial of the objections (the District Court alternatively concluded that the Magistrate Judge's decision was well-reasoned and not clearly erroneous). Thus, SCI waived any

argument that its objections were timely and consequently any challenge to the District Court's decision.

2. In the event that this Court reaches the arguments raised by SCI on appeal, this Court should reject those arguments and affirm. SCI challenges enforcement of Wage and Hour's subpoena only to the extent that it was compelled to produce its client list. SCI first argues that Wage and Hour has no legitimate need for the client list. However, Wage and Hour has expansive authority under the FLSA to investigate whether any person has violated the FLSA. It may request documents from one party to determine whether some other party is violating the FLSA. Here, Wage and Hour is legitimately investigating whether SCI's clients are the drivers' joint employers under the FLSA. To make that determination, Wage and Hour must know the identities of the clients, and thus, that information is relevant to the investigation and must be produced by SCI.

SCI also argues that its client list is a trade secret. However, SCI failed to demonstrate to the Magistrate Judge that the list is a trade secret. Even if the list were a trade secret, SCI fails to make an argument as to why the list's status as a trade secret precludes its disclosure in response to the subpoena. SCI cites no case, statute, or other authority for the argument that it is an abuse of discretion to compel the

production of relevant documents in response to a lawful subpoena because the documents are trade secrets. Moreover, the Magistrate Judge exercised appropriate discretion and properly considered SCI's contention that its client list is a trade secret by imposing restrictions on Wage and Hour's use of the list.

STANDARD OF REVIEW

This Court reviews decisions on the enforceability of subpoenas under an abuse of discretion standard. See In re Fitch, Inc., 330 F.3d 104, 108 (2d Cir. 2003) ("Motions to compel and motions to quash a subpoena are both 'entrusted to the sound discretion of the district court.'") (quoting United States v. Sanders, 211 F.3d 711, 720 (2d Cir. 2000)). In a proceeding to enforce an administrative subpoena, a court's review is "'extremely limited.'" E.E.O.C. v. United Parcel Serv., Inc., 587 F.3d 136, 139 (2d Cir. 2009) (quoting N.L.R.B. v. Am. Med. Response, Inc., 438 F.3d 188, 192 (2d Cir. 2006)). Courts defer to an agency's appraisal of the relevancy of the documents sought, "'which must be accepted so long as it is not obviously wrong.'" Am. Med. Response, 438 F.3d at 193 (quoting In re McVane, 44 F.3d 1127, 1135 (2d Cir. 1995)). This Court thus "affirm[s] a district court's finding of relevancy unless that determination is clearly erroneous." Id. (citing McVane, 44 F.3d at 1135).

ARGUMENT

I. THE DISTRICT COURT'S DETERMINATION THAT SCI'S OBJECTIONS TO THE MAGISTRATE JUDGE'S DECISIONS WERE UNTIMELY AND SCI'S FAILURE TO CHALLENGE THAT DETERMINATION ON APPEAL ARE GROUNDS FOR DISMISSING THE APPEAL

1. SCI seeks to appeal the Magistrate Judge's decisions ordering SCI to produce its client list, as well as the District Court's denial of its objections to the Magistrate Judge's decisions. See JA 218. However, SCI waived any appellate review of the Magistrate Judge's decisions by failing to file timely objections with the District Court. "[A] party waives appellate review of a decision in a magistrate judge's Report and Recommendation if the party fails to file timely objections designating the particular issue." Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010); see United States v. James, 712 F.3d 79, 105 (2d Cir.), cert. petition filed (Nov. 22, 2013 No. 13-632); Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003) ("As a rule, a party's failure to object to any purported error or omission in a magistrate judge's report waives further judicial review of the point."). Applying the rule, SCI waived review by this Court of the Magistrate Judge's decisions.

This Court has in some cases conditioned waiver of appellate review for failing to timely object to a magistrate judge's decision on the party's receipt of clear notice of the

consequences of failing to timely object. See Mario v. P&C Food Mkts., Inc., 313 F.3d 758, 766 (2d Cir. 2002) ("Where parties receive clear notice of the consequences, failure timely to object to a magistrate's report and recommendation operates as a waiver of further judicial review of the magistrate's decision.") (citing Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989)); United States v. Male Juvenile (95-CR-1074), 121 F.3d 34, 38-39 (2d Cir. 1997) ("We have adopted the rule that failure to object timely to a magistrate judge's report may operate as a waiver of any further judicial review of the decision, as long as the parties receive clear notice of the consequences of their failure to object.") (citing, inter alia, Small, 892 F.2d at 16). Although the Magistrate Judge did not provide clear notice to SCI of the consequences of failing to file timely objections with the District Court, the waiver of appellate review should still apply under the circumstances here. Any requirement that a party have "clear notice" that waiver of appellate review is a consequence of failing to timely object to a magistrate judge's decision is primarily grounded in Small, which involved a pro se party. See 892 F.2d at 16. More recently, this Court "limited" Small's requirement of clear notice to the specific circumstances of that case. Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008) ("We conclude that Small, which concerned a pro se litigant's appeal from a

magistrate's report and recommendation on a dispositive matter, is limited to that context."). If the magistrate judge's decision is on a non-dispositive matter, a pro se party's failure to file timely objections waives the right to appellate review of that decision, even absent clear notice of that consequence. See Caidor, 517 F.3d at 605.

Like the party in Caidor, SCI does not fall within the "limited" context in which Small arose. Caidor, 517 F.3d at 604. Specifically, SCI is not a pro se party and, as a result, is not afforded the same reasonable allowances afforded pro se parties to prevent "'inadvertent forfeiture of important rights because of their lack of legal training.'" Id. at 605 (quoting Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983)). Therefore, any concerns expressed in Small and other cases about the fairness of waiving appellate review of a magistrate judge's decision for failing to file timely objections absent clear notice of that consequence does not apply to SCI.

Waiver of appellate review for failing to timely object to a magistrate judge's decision is "non jurisdictional," and this Court "'may excuse the default in the interests of justice.'" Cephas, 328 F.3d at 107 (quoting Thomas v. Arn, 474 U.S. 140, 155 (1985)). However, there is no "interest of justice" that excuses SCI's failure to timely object to the Magistrate Judge's decisions. SCI conceded to the District Court that its

objections were late; the reason it gave was that its counsel mistakenly believed that the Magistrate Judge was a District Court Judge and that its next step was to file an appeal with this Court instead of objections with the District Court.⁷ In several earlier filings, however, SCI's counsel had correctly identified Magistrate Judge Randolph F. Treece as a Magistrate Judge. In any event, the professed ignorance of SCI's counsel as to the difference between the Magistrate Judge and the District Court Judge here is not an interest of justice excusing application of the waiver rule. In sum, SCI waived review by this Court of the Magistrate Judge's decisions because it failed to file timely objections with the District Court.

2. SCI also waived review by this Court of the District Court's decision by failing to challenge in its opening brief the District Court's determination that its objections were untimely. The District Court denied SCI's objections to the Magistrate Judge's decision for two alternative reasons, each of which alone supported the decision. First, it cited 28 U.S.C. 636(b)(1) and Federal Rule Civil Procedure 72, which both set a 14-day deadline for filing such objections, and determined that SCI's "objections – filed over fourteen days after the MDO was filed on March 11, 2013 – are not timely." JA 217. Second, it

⁷ SCI's untimely objections are ECF no. 17 on the District Court's docket for this case. See JA 3.

ruled that "the detailed and well-reasoned MDO is not in any manner clearly erroneous or contrary to law." Id.

Nowhere in its opening brief to this Court does SCI challenge the District Court's determination that its objections were untimely. Therefore, regardless whether the District Court correctly determined that the objections were untimely, SCI has waived any argument on appeal that its objections were timely. See Arrowood Indem. Co. v. King, 699 F.3d 735, 742 (2d Cir. 2012) (issue not raised in opening brief is not preserved for review on appeal); City of Omaha, Neb. Civilian Employees' Ret. Sys. v. CBS Corp., 679 F.3d 64, 66 n.2 (2d Cir. 2012) ("Because such claims are nowhere addressed in plaintiffs' opening brief, we deem them to be waived."); see also Waldron v. Milana, No. 12-4105-cv, 2013 WL 4733215, at *3 n.3 (2d Cir. Sept. 4, 2013) (summary order) (although evidence suggested that arrest may have been earlier, party failed in its opening brief to challenge district court's determination of when arrest was made and thus waived any argument on appeal). SCI's appeal of the District Court's decision must be dismissed because of its failure to challenge one of the two independent bases supporting the decision.

II. THE MAGISTRATE JUDGE CORRECTLY COMPELLED SCI TO PRODUCE ITS CLIENT LIST

Even if this Court reaches the arguments made by SCI on appeal, this Court should affirm the order that SCI produce its client list. Given courts' "extremely limited" role in proceedings to enforce administrative subpoenas, Wage and Hour needed to show only the following to enforce its subpoena: (1) its investigation will be conducted pursuant to a legitimate purpose, (2) the information sought may be relevant to that purpose, (3) the information sought is not already within its possession, and (4) it has followed the required administrative steps. See United Parcel Serv., 587 F.3d at 139; Am. Med. Response, 438 F.3d at 192. Upon such a showing, the burden was then on SCI to demonstrate that the subpoena is unreasonable or that compliance would be unnecessarily burdensome. See United Parcel Serv., 587 F.3d at 139; Am. Med. Response, 438 F.3d at 192-93; McVane, 44 F.3d 1135 ("The burden of demonstrating that an administrative subpoena is unreasonable falls on the individual to whom it is directed."). Applying this legal framework, the Magistrate Judge enforced the subpoena in large part.

On appeal, SCI challenges only the order that it produce its client list. SCI argues that Wage and Hour has no "legitimate need" for the client list because it already has

sufficient information to evaluate the drivers' classification as independent contractors. SCI also argues that its list qualifies as a trade secret and therefore should not be produced in response to the subpoena (or in the alternative, greater restrictions should be imposed on Wage and Hour's use of the list). SCI's arguments are without merit.

1. SCI's Client List Is Relevant to Wage and Hour's Investigation, and in Particular, to Its Determination Whether the Clients Are Joint Employers of the Drivers.

SCI's argument that Wage and Hour has no "legitimate need" for the client list has no basis in the FLSA or this Court's legal framework for evaluating administrative subpoenas. Instead, the correct question is whether the client list is relevant to the purpose of the investigation. See United Parcel Serv., 587 F.3d at 139; Am. Med. Response, 438 F.3d at 192. Wage and Hour has shown that the identities of SCI's clients are relevant to the investigation, especially to the determination whether the clients are joint employers of the drivers under the FLSA. And this Court affirms a finding of relevancy "unless that determination is clearly erroneous." Am. Med. Response, 438 F.3d at 193.

This Court's review of the relevancy of the client list to the investigation must be grounded in Wage and Hour's expansive authority under the FLSA to conduct investigations. Section 11(a) authorizes investigations "to determine whether *any person*

has violated any provision of [the FLSA]" and investigations "which may aid in the enforcement of the provisions of [the FLSA]." 29 U.S.C. 211(a) (emphasis added). Nothing in section 11(a) limits Wage and Hour's investigative authority to only one employer and that employer's workers or to only the worker or workers who complained. See id. Moreover, section 11(a) does not limit Wage and Hour's authority to request records to only those records that the FLSA expressly requires employers to keep regarding their workers. See id. Rather, Wage and Hour may request any records that it "may deem necessary or appropriate to determine whether *any person* has violated" the FLSA or which may aid in FLSA enforcement. Id. (emphasis added). The breadth of section 11(a)'s investigative authority makes clear that Wage and Hour may request records from a party for the purpose of determining whether *some other party* has violated the FLSA. See id. Moreover, Wage and Hour "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950). Seeking information from SCI regarding its clients to determine whether the clients are violating or complying with the FLSA is well within section 11(a)'s subpoena authority.

The primary purpose of Wage and Hour's investigation here is to determine whether the drivers' classification as

independent contractors violates the FLSA and whether SCI and its clients are the drivers' joint employers under the FLSA. See JA 7-8. SCI handles payroll and administrative functions with respect to the drivers and classifies them as independent contractors, but the drivers actually perform their services for the benefit of the logistics and courier companies who are SCI's clients. See JA 7-8, 67. The drivers thus work for SCI's clients, and Wage and Hour believes that those clients may be joint employers with SCI of the drivers under the FLSA. Even if they are not joint employers of the drivers, SCI's clients may have information relevant to Wage and Hour's determination whether the drivers were incorrectly classified as independent contractors in violation of the FLSA. As the Magistrate Judge concluded, these are legitimate inquiries for Wage and Hour to explore. See JA 150, 159.

To determine under the FLSA the nature of the employment relationship between the drivers and SCI's clients, Wage and Hour must analyze the economic realities of the drivers' working relationship with the clients. See, e.g., Zheng v. Liberty Apparel Co., 355 F.3d 61, 71-72 (2d Cir. 2003) (describing multi-factor economic realities analysis used to determine joint employment under the FLSA); Brock v. Superior Care, Inc., 840 F.2d 1054, 1058-59 (2d Cir. 1988) (describing multi-factor economic realities analysis used to determine whether workers

are employees or independent contractors under the FLSA). These analyses are fact-intensive, and of course, Wage and Hour must know the identities of SCI's clients to conduct the analyses. Even if SCI were to provide every piece of information in its possession about its drivers, Wage and Hour would be unable to determine whether SCI's clients are joint employers of the drivers without the clients' identities. Thus, the client list is relevant to Wage and Hour's investigation.

Ordering SCI to produce its client list is in line with other courts' decisions ordering the production of similar information in response to Wage and Hour's administrative subpoenas. For example, a court enforced a Wage and Hour subpoena and ordered a courier company to produce the identities and contact information of its customers because that information was relevant to the investigation whether the courier company's drivers were misclassified as independent contractors under the FLSA. See Solis v. Zion Delivery Serv., Inc., No. 2:12-cv-09956-GAF-MRW, slip op. at 6-7 (C.D. Cal. Jan. 15, 2013) (attached as Addendum A). Likewise, another court enforced a Wage and Hour subpoena and ordered a residential home builder to produce the identities and contact information of its contractors and suppliers because the information was relevant to the investigation whether workers on residential home construction projects were paid in compliance with the FLSA.

See Solis v. Pultegroup, Inc., No. 12-50286, 2013 WL 4482978, at *1, *4 (E.D. Mich. Aug. 19, 2013).

In sum, Wage and Hour has expansive subpoena authority under the FLSA and, in order to determine the drivers' employment status with respect to SCI's clients, Wage and Hour must know the identities of those clients. Indeed, other courts have compelled employers to produce such information in response to Wage and Hour's subpoenas. Accordingly, the finding that SCI's client list is relevant to the purpose of Wage and Hour's investigation satisfies the deferential "clearly erroneous" standard of review applicable to that finding, and therefore this Court should reject SCI's argument that Wage and Hour "has no legitimate need" for the client list.

2. Compelling SCI to Produce Its Client List Even If It Were a Trade Secret Was Not an Abuse of Discretion.

Even if SCI were able to show that its client list is a trade secret, that status does not bar the list's production in response to a lawful administrative subpoena, particularly considering the list's relevance to the investigation and the restriction imposed on Wage and Hour's use of the list.

As an initial matter, SCI did not show that its client list qualifies as a trade secret. The Magistrate Judge aptly found that, "[o]ther than conclusory statements that its client list is 'carefully guarded,' [SCI] has not outlined in any detail how

it protects or guards its customer lists, except in one particular situation." JA 160. The Magistrate further found that it was "unclear" whether a non-disclosure provision in SCI's agreements with its drivers "would constitute a substantial effort to maintain the clients' list as confidential." JA 161. In its motion for reconsideration, SCI sought to buttress its argument that its client list qualifies as a trade secret; however, the Magistrate Judge rightly criticized SCI for using the motion for reconsideration as "a veiled attempt to overcome previous deficiencies and to plug in information [SCI] failed to reveal earlier." JA 212. SCI thus had the opportunity to prove that its client list is a trade secret, but it fell short.

Even if SCI's client list were a trade secret, compelling its production was not an abuse of discretion. SCI's opening brief devotes numerous pages to the argument that its client list qualifies as a trade secret but makes no argument and cites no authority as to why the list's status as a trade secret would bar its disclosure in response to Wage and Hour's subpoena. Wage and Hour's statutory subpoena authority is not limited to documents that are not trade secrets. See 29 U.S.C. 209; 15 U.S.C. 49. There is no dispute that the subpoena is a lawful exercise of that authority, and as demonstrated supra, SCI's client list is relevant to Wage and Hour's investigation. Thus,

even if SCI had argued that the list's status as a trade secret precludes its disclosure, there is no basis for that argument.

Moreover, the Magistrate Judge fairly considered and addressed the possibility that SCI's client list is a trade secret or otherwise confidential by imposing a restriction on Wage and Hour's use of the list. See JA 161 ("DOL is not to publish, disclose, nor reveal this list to any third party outside the context of any prospective litigation."). The Magistrate imposed this restriction even after determining that "the fear that DOL intends to share all of this information with [SCI's] universe of competitors is utterly without basis." JA 157. The fact that the Magistrate Judge imposed this restriction further demonstrates that compelling production of SCI's client list was not an abuse of discretion, even if the list were a trade secret.

SCI's remaining contentions have no merit. First, SCI's assertion that Mr. Greene filed a complaint that was the impetus for Wage and Hour's investigation and that Wage and Hour negligently exposed his identity as the complainant is irrelevant speculation. Wage and Hour has not identified Mr. Greene or anyone as a complainant in connection with this investigation. As a matter of policy, Wage and Hour does not disclose as part of an investigation the identity of the complainant or even if there is a complainant. "All complaints

are confidential; the name of the worker and the nature of the complaint are not disclosable; whether a complaint exists may not be disclosed." Wage and Hour Division Fact Sheet #44, Visits to Employers (available at <http://www.dol.gov/whd/regs/compliance/whdfs44.pdf>). Moreover, Wage and Hour does not need a complaint to perform an investigation; Wage and Hour also selects employers and industries to investigate on its own as part of its targeted or directed investigations. See id.; see also Wage and Hour Division Fact Sheet #77A, Prohibiting Retaliation under the Fair Labor Standards Act (FLSA) (available at <http://www.dol.gov/whd/regs/compliance/whdfs77a.pdf>) ("The Wage and Hour Division investigates FLSA violations through its complaint-based and directed investigation programs."). And in connection with its investigations, Wage and Hour gathers evidence from numerous persons beyond the complainant (if there is a complainant). Thus, SCI's assertions regarding Mr. Greene are speculative and have no bearing on the enforceability of the order that it produce its client list.

Second, SCI's concern that Wage and Hour will share its client list with the Internal Revenue Service ("IRS") pursuant to a Memorandum of Understanding ("MOU") between the Department and the IRS is misplaced. The MOU's existence has no effect on Wage and Hour's authority to subpoena relevant documents in

connection with an investigation. Moreover, Wage and Hour would not be required to share SCI's client list with the IRS; instead, any sharing of information is "at DOL's discretion and consistent with applicable law." JA 198 (Section 7.A. of the MOU). In addition, the MOU places strict safeguards on the IRS' disclosure and use of information such as a client list received from Wage and Hour. JA 199 (Section 9 of the MOU), 201 (Section 13 of the MOU). Third, SCI's concern that its producing the client list will breach any confidentiality that it owes its clients is unfounded. There must necessarily be an exception in any confidentiality provision for disclosures required by law or legal process (which is the case here).

In sum, even if SCI's client list were a trade secret (a showing that SCI failed to make before the Magistrate Judge), ordering its production in response to a lawful administrative subpoena was not an abuse of discretion, especially considering the list's relevance and the restrictions imposed on Wage and Hour's use of the list. SCI's other arguments are unpersuasive.

CONCLUSION

For the foregoing reasons, this Court should dismiss SCI's appeal, or in the alternative, affirm the order compelling SCI to produce its client list in response to the administrative subpoena.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Response Brief of the Secretary of Labor:

(1) was prepared in a monospaced typeface using Microsoft Word utilizing Courier New 12-point font containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 6,052 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Dean A. Romhilt

DEAN A. ROMHILT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Response Brief of the Secretary of Labor was served this 23rd day of December, 2013, via the Court's ECF system and by pre-paid overnight delivery, on the following:

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ADDENDUM A