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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH CENTRAL DIVISION**

<p>THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,</p> <p>PETITIONER,</p> <p>v.</p> <p>PARAGON CONTRACTORS CORPORATION, BRIAN JESSOP, DALE BARLOW; KEITH DUTSON; VERGEL STEED; and CORPORATION OF THE PRESIDING BISHOP OF THE FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,</p> <p>RESPONDENTS.</p>	<p>Case No. 2:13cv00281-RJS</p> <p>PETITIONER’S RESPONSE TO NEPHI JEFFS’ MOTION TO QUASH SUBPOENA OR ALTERNATIVELY, MOTION FOR PROTECTIVE ORDER AND STAY</p> <p>The Honorable Robert J. Shelby</p>
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Petitioner hereby submits this Response to Motion to Quash Subpoena or Alternatively, Motion for Protective Order and Stay (Doc. 71).

I. INTRODUCTION

The Wage Hour Salt Lake City District Office learned of a news report aired by CNN in early December 2012 alleging that child labor violations involving hundreds of children were occurring at a pecan ranch in southern Utah. Wage Hour immediately opened an investigation. Due to the seriousness of the allegations Wage Hour acted quickly and utilized its investigative subpoena authority to issue subpoenas *duces tecum* and *ad testificandum* to Paragon Contractors Corporation (“Paragon”), one of the entities believed to be involved, as well as several individuals. Through the course of its investigation, Wage Hour learned of the possible involvement of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (“FLDS church”) in organizing and transporting the children to work at the pecan ranch, which implicates potential joint employment under the Fair Labor Standards Act (“FLSA”). Wage Hour is currently engaged in multiple subpoena enforcement actions before this Court. The only issue in the present motion is whether the subpoena served to Nephi Jeffs by Wage Hour on January 6, 2014, is proper and requires Mr. Jeffs to appear and provide testimony related to Wage Hour’s investigation. Wage Hour has broad investigative subpoena authority and only needs to show that the evidence sought is material and relevant to a lawful purpose of the agency. For the reasons set forth below, the Court should find that the subpoena is enforceable and enter an order denying Mr. Jeffs’ motion to quash and motion for protective order and stay.

II. PROCEDURAL BACKGROUND

Pursuant to its investigation, Wage Hour issued an administrative subpoena to the Corporation of the Presiding Bishop of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (“Corporation of the Presiding Bishop”). When the Corporation failed to appear pursuant to the subpoena the Secretary initiated a subpoena enforcement action. Subsequently, when the Corporation failed to appear at the Show Cause Hearing the Secretary requested and obtained a bench warrant for the arrest of Nephi Jeffs as registered agent for the Corporation. The Court has already ruled, twice, on objections raised by Mr. Jeffs regarding the subpoena to the Corporation and the bench warrant for Nephi Jeffs’ arrest (Docs. 64 & 66). The Court’s prior rulings moot the same objections in Mr. Jeffs’ present motion.

On January 6, 2014, Mr. Jeffs appeared in his capacity as “registered agent” for the Corporation. Prior to his appearance, the undersigned advised counsel for Mr. Jeffs of her intent to question Mr. Jeffs both in his individual capacity as well as his capacity as registered agent for the Corporation. Counsel objected to Wage Hour questioning Mr. Jeffs in his individual capacity, arguing that he had not been properly subpoenaed. In an effort to avoid involving the Court on this issue, the Secretary asked counsel to accept service of a subpoena for Mr. Jeffs. Counsel refused to do so. As a result, Wage Hour served Mr. Jeffs a subpoena when he appeared in his capacity as the registered agent for the Corporation on January 6, 2014. The subpoena served to Mr. Jeffs on January 6, 2014, is the subject of the present motion.

During the administrative subpoena testimony proceedings on January 6, 2014, counsel for Mr. Jeffs asserted an ongoing objection to all questions posed to Mr. Jeffs in his individual capacity on the basis that the subpoena issued to him was improper. Counsel also instructed Mr.

Jeffs not to answer the majority of the questions posed based on alleged federal and state constitutional rights. Magistrate Judge Furse intervened in the proceeding and found that Wage Hour's service of the subpoena to Nephi Jeffs was proper, but she granted Mr. Jeffs an opportunity to brief the issue of whether the subpoena was improper for any other reason. Based on Magistrate Judge Furse's ruling, the Secretary ceased all questioning of Mr. Jeffs in his individual capacity.

The only issue before the Court is whether Mr. Jeffs has any valid objections to the subpoena issued to him by Wage Hour on January 6, 2014, to appear and provide testimony related to Wage Hour's investigation. The Secretary contends that the subpoena is proper and Mr. Jeffs must appear to provide testimony.

III. FACTUAL BACKGROUND

A. Wage Hour Promptly Responds to Allegations of Hundreds of Children Working in Violation of the FLSA's Child Labor Provisions.

In December 2012 CNN aired a series of news reports entitled "Forced Child Labor: Picking Pecans for Their Polygamist Prophet," "Warren Jeffs Ordering Child Labor?," and "Warren Jeffs Child Labor." *See* Affidavit of Joseph Doolin ("Doolin Aff.") ¶ 3, attached hereto as Exhibit A. The reports allege that Warren Jeffs, the "polygamous leader" of the FLDS church ordered the use of child labor on the Southern Utah Pecan Ranch ("SUPR") located in Hurricane, UT. *Id.* The reports include footage of "hundreds of children" (per the reporter) working on the pecan ranch at noon in the middle of a school day. *Id.* The footage depicts very young children working on the farm. *Id.* Following these allegations the Wage Hour Salt Lake City District Office opened an investigation. *Id.*

Through its investigation Wage Hour learned that Paragon had managed and operated SUPR since at least 2008, including at the time CNN took the video footage. *Id.* at ¶ 4. Wage Hour has investigated Paragon before. In 2007, Wage Hour investigated Paragon for child labor violations in construction work. *Id.* As a result of the investigation, Paragon, Brian Jessop, and James Jessop are permanently enjoined from violating the FLSA's child labor provisions as well as its minimum wage, overtime, and record keeping provisions. *Id.* The Permanent Injunction entered by U.S. District Court Judge Tena Campbell on November 28, 2007, is attached as Exhibit 1 to Joseph Doolin's Affidavit.

B. Through Its Investigation Wage Hour Learned that Up To 1,400 FLDS Children Were Allowed to Work Without Pay During School Hours at SUPR While Paragon Was Managing and Operating the Property.

Wage Hour subpoenaed the testimony Dale Barlow, an agent of Paragon who managed the SUPR property on Paragon's behalf from 2011 to the present. Doolin Aff. ¶ 5. Mr. Barlow testified that he facilitated and organized between 200-300 school age children and their parents entering SUPR to pick the "ground nuts" on the ranch property in 2008, 2009, and 2010. *Id.*; *see also* Transcript of Dale Barlow at 20:8-11, 21:2-3, 22:12-14, 29:3-30:19, which is attached hereto as Exhibit B.¹ In 2011, up to 600 school age children and their parents entered SUPR to pick up the "ground nuts" (*Id.* at 36:9-38:3); and in 2012, up to 1,400 individuals were present to do the work. *Id.* at 101:18-102:21. Mr. Barlow refers to these individuals as "my ladies, my family, my girls" and as "my friends." *Id.* at 127:14-128:9. Yet he refused to provide any of their names, first or last, ages, or contact information. *Id.* at 36:22-40:11, 128:6-129:4. He also

¹ The cover page and all pages of Dale Barlow's transcript cited herein are attached as Exhibit B.

refers to these individuals as members of the FLDS church. *Id.* at 20:3-6, 21:19-20, 22:2, and 29:5.

Wage Hour has issued numerous subpoenas and is actively engaged in several subpoena enforcement actions with the primary goal of obtaining the names, ages, and contact information of all persons who worked at SUPR or were given permission to enter SUPR to participate in the pecan harvest, and all supporting documentation reflecting the dates and times those individuals were there. Doolin Aff. at ¶ 6. Wage Hour is also working to identify the employment relationships between Paragon, the FLDS church, and SUPR. *Id.* This information goes to the heart of Wage Hour's investigation of the alleged child labor violations. *Id.*

Through its investigation, Wage Hour obtained a voicemail recording that was allegedly sent to all FLDS church members. Doolin Aff. at ¶ 7. The recording states "Good afternoon, this is a message from the Bishop's Office. This is a call for all schools to take the rest of the week off of school to help with the nut harvest." *Id.* The individual on the message provided directions where to meet ("at the Foothills School at 8:00 a.m."), and ordered that all available 15-passenger vans be brought to the Foothills School. *Id.* Finally, the message directs the recipients of the call to contact Dale Barlow at the cell phone provided with any questions. *Id.*

The voicemail and the CNN news reports directly link the child labor activities at SUPR to the FLDS church. *Id.* at ¶ 8. Based on this link, Wage Hour has reason to believe that the FLDS church and Paragon may be joint employers of the children in violation of child labor laws. *Id.* Wage Hour is in the process of investigating the FLDS church's connection with Paragon and the child labor activities that took place at SUPR. *Id.* To that end, Wage Hour issued a subpoena to the Corporation of the Presiding Bishop, which Wage Hour believes is the

“Bishop’s Office” referred to in the message, and to Nephi Jeffs, whom Wage Hour has reason to believe is “second-in-command” of the FLDS church and as such is likely to have information relevant to Wage Hour’s investigation. *Id.*

C. Nephi Jeffs is a Proper Subject of Wage Hour’s Investigative Subpoena Power

According to the Utah Secretary of State website, Nephi Jeffs is the registered agent of the Corporation of the Presiding Bishop of the Fundamentalist Church of the Latter Day Saints (“Corporation of the Presiding Bishop”) and the Corporation of the President of the Fundamentalist Church of Latter Day Saints (“Corporation of the President”). *Id.* At ¶ 9. As part of its investigation of the FLDS church as a potential employer under the FLSA, Wage Hour needs more information about these corporate entities and their relationship to the church. *Id.* As the registered agent, Nephi Jeffs may have relevant information regarding these corporate entities. *Id.*

In addition, through its investigation Wage Hour has learned that Nephi Jeffs is the personal assistant of Warren Jeffs² and is “second-in-command” of the FLDS church to Warren Jeffs. *Id.* Upon information and belief, Nephi Jeffs receives the majority of Warren Jeffs’ calls from prison and is responsible for delivering Warren Jeffs’ messages to the FLDS community. *Id.* In this regard, Wage Hour has reason to believe that Nephi Jeffs acts as an agent for the FLDS church. *Id.* Given his leadership and rank in the church, it is likely that Nephi Jeffs has information regarding how and to whom voicemails from the “Bishop’s Office” are distributed (including the voicemail obtained by Wage Hour in the course of its investigation); who recorded

² Warren Jeffs is widely known and recognized as the Presiding Bishop and leader of the FLDS church. He is currently incarcerated in Palestine, TX.

and distributed the voicemail that Wage Hour obtained (and/or directed that the voicemail be recorded and distributed); whether and at whose direction church vehicles were used to transport FLDS families to and from SUPR; the identity of the records custodian for the FLDS church; the location of the church's office where records are likely stored; the location of any documents related the FLDS church's activities at SUPR; and the names and contact information of other church leaders who would have information regarding the church's involvement at SUPR. *Id.* In addition, Mr. Jeffs may be able to identify individuals depicted in photographs and in the CNN footage taken at SUPR. *Id.* All of this information is material and relevant to Wage Hour's investigation of the child labor activities that took place at SUPR. *Id.*

IV. LEGAL ARGUMENTS

A. FRCP 26 and 45 Do Not Apply to Administrative Subpoenas; the Subpoena Issued to Nephi Jeffs Must be Enforced Under to the Applicable Statutory Authority

Nephi Jeffs' reliance on Fed. R. Civ. P. 26 and Fed. R. Civ. P. 45 as authority for quashing Wage Hour's administrative subpoena is misplaced. The Department of Labor's investigatory power is not limited by the Federal Rules of Civil Procedure. Rather, Section 11(a) of the FLSA, 29 U.S.C. § 211(a), authorizes the Secretary to investigate and gather data regarding wages, hours, and other conditions and practices of employment in order to determine whether any person has violated any provision of the FLSA or which may aid in the enforcement of the FLSA.³ And under section 9 of the FLSA, the Secretary can issue a subpoena to require

³ Section 11(a) of the FLSA, 29 U.S.C. § 211(a) provides in relevant part as follows:

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of

the production of documentary evidence and attendance of witnesses relating to any matter under investigation. 29 U.S.C. § 209.⁴ These statutes are the source of the Department's investigative power, and are the appropriate statutes for enforcement of Wage Hour's subpoenas.

The Advisory Committee notes that accompany Rule 45 reinforce this point:

This rule applies to subpoenas *ad testificandum* and *duces tecum* issued by the district courts for attendance at a hearing or a trial, or to take depositions. **It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes.** Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States.

(emphasis added.) For the same reason Fed. R. Civ. P. 26, entitled "Duty to Disclose; General Provisions Governing Discovery," also does not apply; the parties are not in litigation and this is not a discovery dispute. Therefore, upon a showing that the administrative subpoena issued to Nephi Jeffs' is enforceable under the applicable statutory authority, Nephi Jeffs' motion to quash must be denied.

employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter.

⁴ 29 U.S.C. § 209 makes the provisions of sections 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. §§ 49, 50, applicable to the Secretary's powers to conduct investigations under the FLSA. 15 U.S.C. § 49 provides for the issuance of subpoenas to obtain documentary evidence and attendance of witnesses and enforcement of the subpoena in district court.

B. An Administrative Subpoena Issued Pursuant to a Legitimate Investigation and Seeking Reasonably Relevant Information Must Be Enforced.

It is well established that an administrative subpoena enables a federal agency to carry out its duty to conduct investigations to determine if violations of the law have occurred. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 201 (1946); *see also Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984) (reaffirming holding in *Oklahoma Press*). Consequently, to invalidate an administrative subpoena is to question the power of Congress to delegate enforcement of federal laws. *Oklahoma Press*, 327 U.S. at 201. Subpoena enforcement matters are therefore summary in nature. *See EEOC v. Dillon Companies, Inc.*, 310 F.3d 1271, 1277 (10th Cir. 2002); *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 299 (8th Cir. 1984) (“Departing from the summary nature of a subpoena enforcement proceeding is the exception rather than the rule.”).

To obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is: (1) not too indefinite; (2) reasonably relevant to an investigation which the agency has authority to conduct; and (3) that all administrative prerequisites have been met. *See SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 513 (10th Cir. 1980) (*citing United States v. Morton Salt*, 338 U.S. 632 (1950)).

When reviewing the enforceability of an administrative subpoena the district court should limit its inquiry to whether the evidence sought is material and relevant to a lawful purpose of the agency. *Oklahoma Press*, 327 U.S. at 209; *see also Dillon*, 310 F.3d at 1277 (“Because the EEOC’s subpoena seeks information that might shed light on [plaintiff’s] charges and that is not plainly irrelevant, the subpoena must be enforced.”).

C. The Court Should Enforce Wage and Hour’s Administrative Subpoena *Ad Testificandum* Because the Agency Meets the Tenth Circuit Three-Prong Test for Enforcement.

i. The Subpoena is Not Too Indefinite

The subpoena requires Jeffs’ attendance for testimony regarding Wage Hour’s investigation of Paragon Contractors Corporation and any and all related individuals and entities. The Secretary has agreed to schedule the subpoena testimony proceeding on a date and time and at a location that is convenient for Mr. Jeffs.⁵ As such, there are no grounds to argue that the subpoena is too indefinite.

ii. The Subpoena is Reasonably Relevant to an Investigation Which the Agency has Authority to Conduct

As summarized above, Wage Hour has identified a direct link between the child labor activities that occurred at SUPR and the FLDS church and Wage Hour suspects that the FLDS church may be a joint employer with Paragon of the child labor activities under the FLSA. Further, Wage Hour has reason to believe that Nephi Jeffs is closely tied to the Corporation of the Presiding Bishop and the Corporation of the President, both or either of which act as the corporate sole of the FLDS church. Wage Hour also has reason to believe that Nephi Jeffs is “second-in-command” of the FLDS church and is likely to have information relevant to Wage Hour’s investigation, including: the relationship with the Corporation of the Presiding Bishop and the Corporation of the President to the FLDS church; how and to whom voicemails from the “Bishop’s Office” are distributed; whether church vehicles were used to transport FLDS families

⁵ As a courtesy to Nephi Jeffs, the Secretary agreed to hold the subpoena testimony proceedings in St. George, Utah. This should not be construed in any way as a concession that the mileage requirements of Rule 45(c) apply. To the contrary, 15 U.S.C. § 49 expressly states that attendance of witnesses “may be required from any place in the United States.”

to and from SUPR; where any documents related the FLDS church's activities at SUPR would be located; the identity of the records custodian for the FLDS church; the location of the church's office where records are likely held; and the names and contact information of other church leaders who would have information regarding the church's involvement at SUPR. In addition, Mr. Jeffs could likely identify individuals depicted in photographs and in the CNN footage taken at SUPR. All of this information is relevant and material to Wage Hour's investigation of the child labor activities and potential FLSA violations that took place at SUPR.

Here, as set forth in Joseph Doolin's affidavit, the Wage and Hour Division initiated an investigation of Paragon in order to determine whether any person had violated any provision of the FLSA or regulations promulgated thereunder. *See Doolin Aff.* ¶ 2. The agency issued a subpoena to Nephi Jeffs in order to obtain information necessary to its investigation. Such an inquiry is for a purpose lawfully authorized by Congress and a legitimate exercise of the Secretary's authority. The Secretary's authority to issue subpoenas to determine compliance with or violation of the FLSA is well established. *See Oklahoma Press*, 327 U.S. at 201. As such, the Court should find that the subpoena issued to Nephi Jeffs was issued for the lawful purpose of enforcing compliance with the FLSA, which is authorized by Section 11(a) of the FLSA, 29 U.S.C. § 211(a) and is enforceable.

iii. All Administrative Prerequisites were Met Prior to Issuance of the Subpoena

The administrative subpoena was issued pursuant to Section 9 of the FLSA, which empowers the Wage and Hour Division to issue subpoenas that require the production of documentary evidence and the attendance of witnesses relating to any matter under investigation. 29 U.S.C. § 209 (invoking 15 U.S.C. § 49). There are no other administrative prerequisites

which need to be met prior to the Wage and Hour Division's issuance of an administrative subpoena.

D. The Alternative Relief Sought by Nephi Jeffs is Unwarranted and Premature; there are No Grounds to Issue a Protective Order or a Stay

There are no factual or legal grounds to grant Mr. Jeffs a protective order from Wage Hour's administrative subpoena at this early stage. Although it is highly unlikely that Wage Hour's questions of Mr. Jeffs will implicate his First or Fifth Amendment rights, a determination one way or the other cannot be made until specific questions have been asked and specific privileges have been asserted. Moreover, a stay of Mr. Jeffs' obligation to comply with the subpoena would simply delay Wage Hour's investigation, run the risk of evidence growing stale, and potentially cause prejudice in light of the applicable statute of limitations.

With regard to the First Amendment, Mr. Jeffs is not claiming that the privilege applies to a specific request made by Wage Hour; but instead he is suggesting that the privilege attaches to all questions that Wage Hour may potentially ask of him in the course of its investigation. Mr. Jeffs' assertion of the privilege is entirely speculative in nature, and as such, he has failed to make a prima facie showing that disclosure of the information sought would infringe on his First Amendment rights. *See In re Motor Fuel Temperature Sales Practice Litigation*, 641 F.3d 470 (10th Cir. 2011) (The party claiming a First Amendment privilege bears the burden to make a prima facie showing of the privilege's applicability). In the Tenth Circuit, a party first needs to make a prima facie showing of arguable First Amendment infringement before the burden shifts to the government to make the appropriate showing of need for the material. *See In re First Nat'l Bank, Englewood, Colo.*, 701 F.2d 115, 118 (10th Cir. 1983). Without knowing exactly what information Mr. Jeffs intends to withhold based on the alleged privilege, the government

cannot make the appropriate showing of need for the material. Therefore, Mr. Jeffs' claim of privilege is premature and his request for a protective order based on alleged First Amendment infringement should be denied.

The First Amendment protects an individual from being forced to reveal his beliefs. *Doe v. McMillan*, 412 U.S. 306, 328 (1973) (“[O]ne’s conscience and thoughts are matters of privacy as is the whole array of one’s beliefs or values.”) However, First Amendment rights do not preclude enforcement of child labor laws enacted by the government to accomplish the overriding governmental objective of protecting the health and welfare of the people. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). In the context of Wage Hour’s investigation, the Secretary anticipates that Nephi Jeffs will be able to answer all of the questions posed to him by Wage Hour without revealing his or others’ personal adherence to any particular religious beliefs. We cannot presume at this stage that the information sought is privileged under the First Amendment without a clear record of what information is being sought and what information is ultimately withheld based on a specific claim of privilege.

The same holds true with regard to the Fifth Amendment. Here, Mr. Jeffs acknowledges that the Fifth Amendment can only be asserted on a question-by-question basis with the Court determining in each instance the applicability of the privilege and the propriety of the refusal to testify. *In re Lindsey*, 229 B.R. 797, 801-02 (B.A.P. 10th Cir. 1999). A party invoking the Fifth Amendment privilege is not entitled to a blanket assertion of the privilege, but must make a specific showing that a response to each question “will pose a substantial and real hazard of subjecting [the party] to criminal liability.” *Id.* (citing *United States v. Schmidt*, 816 F.2d 1477, 1482 (10th Cir. 1987)). There is no basis to presume at this stage that the information

sought by Wage Hour will implicate Mr. Jeffs' Fifth Amendment rights and Mr. Jeffs has failed to make a showing otherwise. As such, the Court must reject Mr. Jeffs' vague and blanket assertion of the Fifth Amendment as grounds for quashing the subpoena or as grounds for a protective order.

Finally, contrary to allegations by Mr. Jeffs, Wage Hour's investigation of child labor and FLSA violations is not part of "an overall government consolidated effort against the FLDS community." As stated, Wage Hour's investigation was initiated by the CNN news reports. Wage Hour is intent on investigating what appear to be credible allegations of child labor at SUPR that happens to involve Paragon and the FLDS church. This is the nature and extent of Wage Hour's investigation and the only basis for the subpoena issued to Nephi Jeffs. Mr. Jeffs' allegations of a government conspiracy against the FLDS community are purely conjectural and unfounded.

V. CONCLUSION

WHEREFORE, the Secretary prays that this Court DENY Nephi Jeffs' Motion to Quash Subpoena or Alternatively, Motion for Protective Order and Stay.

DATED this 21st day of January, 2014.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

<p>THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,</p> <p>Petitioner,</p> <p>v.</p> <p>PARAGON CONTRACTORS CORPORATION, BRIAN JESSOP, DALE BARLOW, KEITH DUTSON, VERGEL STEED and CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,</p> <p>Respondents.</p>	<p>NEPHI JEFF’S REPLY TO PETITIONER’S MOTION TO QUASH SUBPOENA OR ALTERNATIVELY, MOTION FOR PROTECTIVE ORDER AND STAY</p> <p>Case No. 2:13CV00281RJS</p>
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Pursuant to Rules 26 and 45(c)(3) of the Federal Rules of Civil Procedure, DUCivR 7-1 and DUCivR 26-2(b), Nephi Jeffs moved this Court to quash the administrative subpoena under which the United States’ Secretary of Labor seeks information. Alternatively, Nephi Jeffs moved this Court for a protective order (Doc. 71). The Petitioner has responded (Doc. 72), and Nephi Jeffs now replies.

BACKGROUND

1. On Monday, January 6, 2014, Nephi Jeffs (“the witness”) was required to travel over 300 miles from his home to appear and answer questions under oath and before a court reporter.
2. The appearance of the witness was required by the Department of Labor (the “Department”) based upon its claim that information was needed for purposes of an investigation relative to purported violations of child labor laws.
3. The witness appeared at 1:00 p.m. as ordered and testified until almost 3:45 p.m. *See* Administrative Subpoena Testimony of Nephi Jeffs, 1/6/2014 at cover, 99 (reflecting time).¹
4. The witness answered all questions propounded to him relative to his role as registered agent and knowledge of the Corporation of the Presiding Bishop of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (“the Corporation”).
5. The witness testified how he had met his obligations as registered agent by mailing a copy of the Department’s subpoena to Warren Jeffs, the Presiding Bishop and Corporate Sole of the Corporation at his address in Palestine, Texas (Tr. at 36).
6. The witness answered questions, in his capacity as registered agent, relative to his knowledge of the affairs of the Corporation including but not limited to:
 - a. knowledge regarding current and past officers (Tr. at 38);
 - b. knowledge regarding the location and status of corporate records (Tr. at 36-40);
 - c. knowledge of the location of the physical office of the corporation (Tr. at 39);

¹ The Transcript of the Administrative Subpoena Testimony of Nephi Jeffs taken on 1/6/2014 will be cited herein as “Tr.” A copy of the transcript is attached as Exhibit A.

- d. knowledge regarding current and past employees (Tr. at 39-40);
- e. knowledge regarding payment of taxes by the corporation (Tr. at 40).

7. The witness repeatedly stated that he could not answer questions regarding the structure or institutional knowledge of the entity of the Corporation because he was merely the registered agent (*e.g.*, Tr. at 39).

8. The witness also outlined the circumstances under which he was asked to be the registered agent (Tr. at. 17-18; 89-90; 93-95, 97).

9. Despite the fact that the witness answered and responded to all questions posed relative to his status as the registered agent, the Department continued to pursue questioning completely unrelated to the witness' registered agent status, including but not limited to:

- a. who is the patriarch of the FLDS church and "roles" of other named persons in the FLDS church (Tr. at 40-44, 49, 52-53);
- b. who maintains a master list of membership for the FLDS church (Tr. at 47);
- c. whether the witness delivered messages from Warren Jeffs to members of the FLDS community (Tr. at 45, 49-50);
- d. the methods of communication between the church and its members (Tr. at 47-48, 50);
- e. whether the witness decodes, transcribes and delivers messages from Warren Jeffs to members of the church (Tr. at 45);
- f. whether the witness was familiar with the storehouse account (Tr. at 45-46);
- g. whether the witness was familiar with, or involved in, the pecan harvest purported

to be the current subject of alleged child labor law violations (Tr. at 50-51, 53-56).

10. The witness specifically invoked his First and Fifth Amendment Privileges with regard to numerous questions posed, including:²

- a. Has the witness ever been employed by the Corporation of the Presiding Bishop of the FLDS Church? (Tr. at 11-12);
- b. Is the Corporation the church? (Tr. at 14-15);
- c. Is the witness a member of the FLDS Church? (Tr. at 18);
- d. Does the witness hold any titles in the FLDS Church? (Tr. at 19);
- e. Whether the witness transcribes messages from Warren Jeffs to members of the FLDS community (Tr. at 45);
- f. Whether the witness decode messages from Warren Jeffs to the FLDS community (*Id.*);
- g. Whether the witness delivers messages from Warren Jeffs to members of the FLDS community (*Id.*);
- h. Whether the witness is familiar with what is known as the storehouse account (Tr. at 45-46);
- i. Whether the witness ever talked to Warren Jeffs about the subpoenas (Tr. at 47);
- j. Does the Corporation maintain a master list of members of the FLDS Church? (*Id.*);

²At the time of filing of Mr. Jeff's initial memorandum, a transcript was not yet available. However, Mr. Jeffs did properly invoke privilege to specific questions posed to him.

- k. Who maintains a master list of members in the FLDS Church? (*Id.*);
- l. Methods of communication between the church and its members (Tr. at 47-48);
- m. Methods of communication between the Corporation and the members of the FLDS Church (Tr. at 48);
- n. Any distinction between the Presiding Bishop of the Corporation and the Presiding Bishop of the FLDS Church (Tr. at 49);
- o. Does the witness recognize a bishop in the FLDS community other than Warren Jeffs (*Id.*);
- p. Has the witness ever received voice messages from the bishop's office? (*Id.*);
- q. Who sends out messages from the bishop's office? (Tr. at 50);
- r. To whom are the messages from the bishop's office sent? (*Id.*);
- s. Does the Corporation maintain a list of phone numbers of the members of the FLDS Church to whom it sends messages from the bishop's office? (*Id.*);
- t. Is the witness familiar with the Southern Utah Pecan Ranch? (Tr. at 50-52);
- u. What is Paragon Contractors' relationship with the FLDS Church? (Tr. at 52);
- v. How does the witness know Brian Jessop? (Tr. at 52-53);
- w. Is the witness aware that in 2012 Paragon Contractors operated and maintained a pecan harvest at the Southern Utah Pecan Ranch? (Tr. at 53);
- x. Is the witness aware that members of the FLDS Church went to the Southern Utah Pecan Ranch in 2012 to collect nuts left over on the ground after the tree harvest? (*Id.*);
- y. Has the witness ever participated in the nut harvest at the Southern Utah Pecan

Ranch? (*Id.*);

z. What is the FLDS Church's involvement with the nut harvest? (Tr. at 54);

aa. What is the Corporation's involvement with the nut harvest? (Tr. at 54-55);

bb. How are members of the FLDS community notified of the nut harvest at the Southern Utah Pecan Ranch? (Tr. at 55);

cc. Who provides access to the Southern Utah Pecan Ranch to the FLDS members? (Tr. at 56).

ARGUMENT

The obligation of a witness to appear and answer questions, despite the Department's belief otherwise, has to have some limitation (Doc. 72 at 8-10, asserting rules of civil procedure not apply to administrative subpoenas). While the investigative function of the Department in searching out violations is broad and is essentially the same as the function of a grand jury or court in issuing other pretrial orders for discovery of evidence, there are limitations and the Department shall not act arbitrarily or in excess of statutory authority. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 209, 217 (1946). Indeed, as the Department itself acknowledges, "to obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met." *Sec. & Exch. Comm'n v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980). If the government makes this preliminary showing, the respondent may show that enforcement of the subpoena would be improper. *See Chao v. Cmty. Trust Co.*, 474 F.3d 75, 79 (3d Cir.2007) (cited in *Chao v. Bowles*,

2008 WL 4538836 (D. Colo. Oct. 7, 2008)). Persons may object to the Department's requests as being irrelevant, inappropriate, inconvenient, or otherwise unreasonable. *See, e.g. Oklahoma Press*, 327 U.S. at 209, 217; *Cf. Holloway Gravel Co. v. McComb*, 174 F.2d 421 (5th Cir. 1949), *cert. denied*, 338 U.S. 823 ("In the absence of a showing that the time and place named for the production of the records is inappropriate or inconvenient or that the administrator seeks records covering an unreasonable period of time, ..." courts will not interfere). Importantly, **questions of privilege do apply** to such enforcement actions such as these. *See, e.g., Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory...").

In this case, the witness has been required to travel over 300 miles and provide almost four hours of testimony. He has answered every question that can be legitimately posed to him and there are no areas of inquiry left that are not constitutionally protected. It falls to this Court to provide some level of protection, particularly in light of the sensitive nature of the subject matter being pursued by the Department.

A. THE DEPARTMENT HAS MADE NO SHOWING THAT NEPHI JEFFS HOLDS ANY RELEVANT, NON-PRIVILEGED INFORMATION IN AN INDIVIDUAL CAPACITY.

In "Part C" of the Department's "Factual Background" section, the Department sets out its theory as to why the witness is a proper subject of its investigative subpoena powers (Doc. 72 at 7-8). These same suppositions are presented in Section IV to support the Department's legal argument regarding relevance (Doc. 72 at 11-12). Overall, the Department presents two theories as to why this witness might have something relevant to say.

First, as “the registered agent,” the Department claims the witness “may have relevant information regarding [the various] corporate entities” and their relationship to the church (Doc. 72 at 7). The obvious problem regarding this first justification is that the Department has had its bite at that apple and all of the questions that can be posed to the witness in his capacity as the registered agent have been both asked and answered.

The Department’s second justification for further questioning is its unsupported speculation that the witness is “the personal assistant” of Warren Jeffs and is “second-in-command” of the FLDS church; therefore, the Department reasons, “given his leadership and rank” the witness is likely to have information. (Doc. 72 at 7).³ Critically, it is obvious and beyond dispute that **all information** sought under this justification falls into the zone of constitutional protection.

Constitutional protection exists under the First Amendment as the Department wishes to delve into the specific workings and order of a specific church (*see* Doc. 71 at 7-10). As such, the Department must be prohibited from inquiring into these matters as they attempted previously at the January 6th questioning; or on the other hand, acknowledge that privilege will again be invoked to any such further questions posed.

³These reasons and the Department’s other conclusions are illuminating. Without exception, all of the reasons cited in the Department’s pleadings and during the January 6th deposition to justify questioning of the witness are based upon this speculation which is devoid of any factual basis. Absolutely no attempt has been made to tie these averments to actual evidence or citation to any record. Rather, the Department hides behind such justifications as “we have anonymous sources,” we have “reason to believe,” or “upon information and belief” (*e.g.*, Tr. at 68-70). This type of guessing highly suggests the proverbial fishing expedition; this one, however, is treading in extremely sensitive waters.

Perhaps even more clearly, and more fatal to the Department's request, is that the Fifth Amendment absolutely protects this witness given the express intentions of the United States Government to investigate and prosecute whom they characterize a criminal organization (*see* Doc. 71 at 13). Despite the Department's contention that such concerns are conjectural and unfounded, the witness has presented to this Court actual fact and testimony, something obviously missing from the Department's pleadings. Further, the Department wholly ignores the fact that this very matter it is now investigating holds criminal penalties, something which the person whom the Department now describes as "second in command" would surely be subject to (*see* Doc. 71 at 12). As such, the Fifth Amendment protects the witness from answering any questions that would in themselves support a criminal conviction, as well as any questions which might furnish a link in the chain of evidence needed to prosecute. *See, e.g., Hoffman v. United States*, 341 U.S. 479, 486 (1951); *United States v. Jones*, 703 F.2d 473, 475-76 (10th Cir. 1983). As noted in previous briefing, to the extent a witness legitimately claims the privilege, the Court is without power to compel answers. *See, e.g., S.E.C. v. Thomas*, 116 F.R.D. 230, 234 (D. Utah 1987); *Hughes Tool Co. v. Meier*, 489 F. Supp. 354, 372 (D. Utah 1977).

B. THE REQUESTED ALTERNATIVE RELIEF IS WARRANTED AND RIPE.

While it has always been acknowledged that a witness may not assert a general privilege and must invoke on a question by question basis,⁴ this Court cannot ignore the fact that all information the Department is now left to seek is protected. Even accepting for argument the

⁴Which, the witness did during questioning on January 6, 2014. *See supra*, pp.4-6 at ¶10 (detailing questions to which the witness invoked privilege).

Department's incorrect guess regarding the witness' role in the FLDS church, the fact remains that there is no non-privileged information that the witness would be able to provide. Given the inconvenience already imposed upon this witness, this Court should not order a second inquiry when all of the information sought is clearly within the realm of protected information.

ACCORDINGLY, this Court should quash the subpoena currently issued or alternatively, fashion a protective order protecting Mr. Nephi Jeffs' First and Fifth Amendment rights.

RESPECTFULLY SUBMITTED this 29th day of January 2014.

/s/ James C. Bradshaw

JAMES C. BRADSHAW
Attorney for Nephi Jeffs

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2014, I electronically filed the foregoing NEPHI JEFF'S REPLY TO PETITIONER'S MOTION TO QUASH SUBPOENA OR ALTERNATIVELY, MOTION FOR PROTECTIVE ORDER AND STAY with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH CENTRAL DIVISION**

<p>THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,</p> <p>PETITIONER,</p> <p>v.</p> <p>PARAGON CONTRACTORS CORPORATION, BRIAN JESSOP, DALE BARLOW; KEITH DUTSON; VERGEL STEED; and CORPORATION OF THE PRESIDING BISHOP OF THE FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,</p> <p>RESPONDENTS.</p>	<p>Case No. 2:13cv00281-RJS</p> <p>PETITIONER’S RESPONSE TO VERGEL STEED’S MOTION TO SUSTAIN OBJECTIONS TO QUESTIONS POSED DURING SUBPOENA TESTIMONY ON JANUARY 6, 2014, AND MEMORANDUM IN SUPPORT</p> <p>The Honorable Magistrate Judge Furse</p>
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Petitioner hereby submits this Response to Vergel Steed's ("Steed") Motion to Sustain Objections to Questions Posed During Subpoena Testimony on January 6, 2014, and Memorandum in Support (Doc. 73).

I. INTRODUCTION

The Wage Hour Salt Lake City District Office learned of a news report aired by CNN in early December 2012 alleging that child labor violations involving hundreds of children were occurring at a pecan ranch in southern Utah. Wage Hour immediately opened an investigation. Due to the seriousness of the allegations Wage Hour acted quickly and utilized its investigative subpoena authority to issue subpoenas *duces tecum* and *ad testificandum* to Paragon Contractors Corporation ("Paragon"), one of the entities believed to be involved, as well as several individuals. Through the course of its investigation, Wage Hour learned of the possible involvement of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS church") in organizing and transporting the children to work at the pecan ranch, which implicates potential joint employment of the children by the FLDS church under the Fair Labor Standards Act ("FLSA"). Wage Hour is currently engaged in multiple subpoena enforcement actions before this Court related to this investigation. The only issue in the present motion is whether Steed should be compelled to answer Wage Hour's questions over his objections based on an alleged First Amendment privilege. For the reasons set forth below, the Court should find that the questions posed to Steed by the Department of Labor ("DOL") on January 6, 2014, do not infringe upon his First Amendment rights and the Court should enter an order compelling Steed to answer all questions asked as well as any necessary follow up questions.

II. PROCEDURAL BACKGROUND

Pursuant to its investigation, Wage Hour issued an administrative subpoena to Vergel Steed. The subpoena was served to Steed at the address of record for the Corporation of the Presiding Bishop of the Fundamentalist Church of Jesus Christ of Latter Day Saints (“Corporation of the Presiding Bishop”) and at his home address. When Steed failed to appear pursuant to the subpoena the Secretary initiated a subpoena enforcement action. Subsequently, Steed failed to appear at the Show Cause Hearing and the Secretary requested and obtained a bench warrant for his arrest. Upon learning of the bench warrant, Steed obtained counsel and agreed to appear for questioning on January 6, 2013. During the course of the administrative subpoena testimony proceeding, Steed routinely refused to answer questions on the basis of his alleged First Amendment rights.

At Petitioner’s request, Magistrate Judge Furse intervened in the proceeding. Petitioner asked the Court to compel Steed to answer the questions posed to him, and if he refused to do so, to find Steed in civil contempt based on his refusal to testify and impose a sanction of incarceration as well as a fine of \$1,000 a day until he complied with the subpoena and answered questions related to Wage Hour’s investigation. The Court asked Steed to brief the legal issues related to his assertion of the First Amendment as a basis for his refusal to testify. Petitioner contends that Wage Hour’s questions do not infringe upon Steed’s First Amendment rights. Petitioner seeks an order compelling Steed to comply with the subpoena and provide testimony related to Wage Hour’s investigation.

III. FACTUAL BACKGROUND

A. Wage Hour Promptly Responds to Allegations of Hundreds of Children Working in Violation of the FLSA’s Child Labor Provisions.

In December 2012 CNN aired a series of news reports entitled “Forced Child Labor: Picking Pecans for Their Polygamist Prophet,” “Warren Jeffs Ordering Child Labor?,” and “Warren Jeffs Child Labor.” *See* Affidavit of Joseph Doolin (“Doolin Aff.”) ¶ 3, attached hereto as Exhibit A. The reports allege that Warren Jeffs, the “polygamous leader” of the FLDS church ordered the use of child labor on the Southern Utah Pecan Ranch (“SUPR”) located in Hurricane, UT. *Id.* The reports include footage of “hundreds of children” (per the reporter) working on the pecan ranch at noon in the middle of a school day. *Id.* The footage depicts very young children working on the farm. *Id.* Following these allegations the Wage Hour Salt Lake City District Office opened an investigation. *Id.*

Through its investigation Wage Hour learned that Paragon had managed and operated SUPR since at least 2008, including at the time CNN took the video footage. *Id.* at ¶ 4. Wage Hour has investigated Paragon before. In 2007, Wage Hour investigated Paragon for child labor violations in construction work. *Id.* As a result of the investigation, Paragon, Brian Jessop, and James Jessop are permanently enjoined from violating the FLSA’s child labor provisions as well as its minimum wage, overtime, and record keeping provisions. *Id.* The Permanent Injunction was entered by the Honorable Tena Campbell on November 29, 2007 in Case No. 2:06cv700TC (Doc. 26).

B. Through Its Investigation Wage Hour Learned that Up To 1,400 FLDS Children Were Allowed to Work Without Pay During School Hours at SUPR While Paragon Was Managing and Operating the Property.

Wage Hour subpoenaed the testimony Dale Barlow (“Barlow”), an agent of Paragon who managed the SUPR property on Paragon’s behalf from 2011 to the present. Doolin Aff. ¶ 5. Barlow testified that he facilitated and organized between 200-300 school age children and their

parents entering SUPR to pick the “ground nuts” on the ranch property in 2008, 2009, and 2010. *Id.*; *see also* Transcript of Dale Barlow at 20:8-11, 21:2-3, 22:12-14, 29:3-30:19, which is attached hereto as Exhibit B.¹ In 2011, up to 600 school age children and their parents entered SUPR to pick up the “ground nuts” (*Id.* at 36:9-38:3); and in 2012, up to 1,400 individuals were present to do the work. *Id.* at 101:18-102:21. Barlow refers to these individuals as “my ladies, my family, my girls” and as “my friends.” *Id.* at 127:14-128:9. Yet he refused to provide any of their names, first or last, ages, or contact information. *Id.* at 36:22-40:11, 128:6-129:4. He also refers to these individuals as members of the FLDS church. *Id.* at 20:3-6, 21:19-20, 22:2, and 29:5.

Through its investigation, Wage Hour obtained a voicemail recording that was allegedly sent to all FLDS church members. Doolin Aff. at ¶ 6. The recording states “Good afternoon, this is a message from the Bishop’s Office. This is a call for all schools to take the rest of the week off of school to help with the nut harvest.” *Id.* The individual on the message provided directions where to meet (“at the Foothills School at 8:00 a.m.”), and ordered that all available 15-passenger vans be brought to the Foothills School. *Id.* Finally, the message directs the recipients of the call to contact Dale Barlow at the cell phone provided with any questions. *Id.*

C. Wage Hour Continues to Investigate the Facts and all Possible Avenues of Liability Under the FLSA.

Wage Hour has issued numerous subpoenas and is actively engaged in several subpoena enforcement actions with the primary goal of obtaining the names, ages, an contact information of all persons who worked at SUPR or were given permission to enter SUPR to participate in the

¹ The cover page and all pages of Dale Barlow’s transcript cited herein are attached as Exhibit B.

pecan harvest, and all supporting documentation reflecting the dates and times those individuals were there. Doolin Aff. at ¶ 7. Wage Hour is also working to identify the employment relationships between Paragon, the FLDS church, and SUPR. *Id.* This information goes to the heart of Wage Hour's investigation of the alleged child labor violations. *Id.*

The voicemail and the CNN news reports directly link the child labor activities at SUPR to the FLDS church. *Id.* at ¶ 8. Based on this link, Wage Hour has reason to believe that the FLDS church and Paragon may be joint employers of the children in violation of child labor laws. *Id.* Wage Hour is in the process of investigating the FLDS church's connection with Paragon and the child labor activities that took place at SUPR. *Id.* To that end, Wage Hour issued three subpoenas: one to the Corporation of the Presiding Bishop, which Wage Hour believes is the "Bishop's Office" referred to in the message; one to Nephi Jeffs, whom Wage Hour has reason to believe is "second-in-command" of the FLDS church and as such is likely to have information relevant to Wage Hour's investigation; and one to Vergel Steed, whom Wage Hour has reason to believe worked for the Corporation of the Presiding Bishop at all times relevant to Wage Hour's investigation as an administrative assistant or in a similar capacity.² *Id.*

Wage Hour believes that Steed likely has information regarding the voicemail message and other information relevant to its investigation, including how and to whom voicemails from the "Bishop's Office" are distributed (including the voicemail obtained by Wage Hour in the course of its investigation); who recorded and distributed the voicemail that Wage Hour obtained

² In his brief, Steed appears to make a distinction between the capacities in which he was subpoenaed (i.e. personal capacity versus some capacity on behalf of the church). This is a distinction without a difference. Steed was subpoenaed to provide information known to him in any capacity that is relevant to Wage Hour's investigation.

(and/or directed that the voicemail be recorded and distributed); whether and at whose direction church vehicles were used to transport FLDS families to and from SUPR; the identity of the records custodian for the FLDS church; the location of the church's office where records are likely stored; the location of any documents related the FLDS church's activities at SUPR; and the names and contact information of other church leaders who would have information regarding the church's involvement at SUPR. *Id.* at ¶ 9. Steed also likely has information regarding the pecan harvest at issue, including Paragon's and the FLDS's involvement with the harvest. *Id.* All of this information is material and relevant to Wage Hour's investigation of the child labor activities that took place at SUPR. *Id.*

IV. LEGAL ARGUMENTS

A. WAGE HOUR'S QUESTIONS DO NOT IMPLICATE STEED'S ALLEGED FIRST AMENDMENT RIGHTS

i. Steed Has Failed to Identify a Bona Fide Religious Belief

A threshold issue in assessing a First Amendment claim is whether the person asserting the First Amendment has a sincerely held bona fide religious belief. *Welsh v. United States*, 398 U.S. 333, 339 (1970); *United States v. Seeger*, 380 U.S. 163, 185 (1965). To be bona fide, a belief must be "sincerely held" and, within the believer's "own scheme of things," religious. *Id.* If the belief asserted is "merely a matter of personal preference" and not "one of deep religious conviction, shared by an organized group," it will not be entitled to protection. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

Steed's alleged belief is purportedly a "religious vow" that he took "not to discuss matters related to the internal affairs or organization of the Fundamentalist Church of Jesus

Christ of Latter-Day Saints.” Steed Aff. at ¶ 4.³ At the time of Steed’s subpoenaed testimony, Steed alleged had a closely held religious belief that “requires him not to speak about the affairs of the church, about individuals involved with the church, or his involvement to a certain degree.” Steed Transcript at 30:22-31:3.⁴ However, secrecy is not a bona fide religious belief that warrants protection under the First Amendment.

Steed failed to make any showing that his alleged belief in secrecy about church matters is “sincerely held” or that it is rooted in deep religious conviction. *See Wisconsin*, 406 U.S. at 216. To the contrary, Steed merely states in an affidavit that disclosing matters related to the FLDS church would “alter his relationship with his church leaders and other church members.” *See Steed Aff.* at ¶ 6. Steed’s personal preference to keep church matters private and fear of reprisal from his church leaders does not trigger protection under the First Amendment. Without a showing of a sincerely held religious belief that is rooted in deep religious conviction, the First Amendment does not apply.

In *International Society for Krishna Consciousness, Inc. v. Barber*, the Second Circuit outlined factors that indicate insincerity, noting that “an adherent’s belief would not be ‘sincere’ if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.” 650 F.2d 430, 441 (2d Cir. 1981). Here, Steed’s alleged belief in secrecy gives him an obvious advantage against Petitioner by shielding him from participation in Wage Hour’s child labor investigation and allowing him to hide secular interests behind a veil of religious doctrine.

³ Steed’s Affidavit is attached as Exhibit B (Doc. 73-2) to his Motion to Sustain Objections.

⁴ The transcript of Steed’s subpoenaed testimony is attached as Exhibit A (Doc. 73-1) to Steed’s Motion to Sustain Objections.

To find a good faith religious belief in secrecy of all church matters in this case would reduce the First Amendment analysis to insignificance and it would lead to absurd results. Such a finding would effectively thwart Wage Hour's child labor investigation by shielding Steed and other members of the FLDS church from participation; and it would block Wage Hour from obtaining the factual information and evidence it needs to fulfil its obligation to enforce the child labor requirements of the FLSA. Wage Hour has video footage of FLDS children picking pecans, testimony from a member of the church stating that up to 1,400 FLDS children were involved in child labor activities, and a voicemail message linking the FLDS church to the use of child labor in a large scale pecan harvest. Questions surrounding the voicemail and the church's involvement in the child labor activities are relevant to Wage Hour's investigation and cannot be avoided on the basis of an alleged bona fide religious belief in secrecy regarding all church matters.

The only basis identified by Steed to invoke the First Amendment privilege is his alleged religious belief in secrecy. Because Steed failed to establish that this belief is bona fide, sincerely held, or rooted in deep religious conviction, the Court should find that the First Amendment privilege does not apply and is not a proper basis for Steed's refusal to testify.

ii. Steed's Assertion of the First Amendment Privilege to All Questions Asked is Overbroad

Steed asserts that the First Amendment protects him from testifying about "matters related to the internal affairs or organization of the [FLDS Church]." It is on this basis that Steed refused to answer the majority of questions from Wage Hour during his subpoenaed testimony. For example, the Secretary asked Steed whether he was employed by the Corporation of the

Presiding Bishop of the FLDS Church, to which Steed responded: “I feel that is a religious question and I should not answer.” *See* Steed Transcript at 12:2-6. Steed’s counsel followed up with the following objection: “I believe he – the question infringes on his free exercise of religion and he doesn’t want to answer that question.” *Id.* at 12:11-13. Steed asserted a blanket objection to all questions that related in any way to the Corporation of the Presiding Bishop on the basis of his alleged First Amendment rights. *Id.* at 19:18-23. He then refused to answer an entire series of questions related to his involvement with and knowledge of the Corporation and other information relevant to Wage Hour’s child labor investigation.⁵ *See* Steed Transcript at 41:14-54:7. This is an overbroad and improper application of the First Amendment.

The First Amendment protects an individual from being forced to reveal his beliefs. *Doe v. McMillan*, 412 U.S. 306, 328 (1973) (“[O]ne’s conscience and thoughts are matters of privacy as is the whole array of one’s beliefs or values.”) However, First Amendment rights do not preclude enforcement of child labor laws enacted by the government to accomplish the overriding governmental objective of protecting the health and welfare of the people. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). In the context of Wage Hour’s investigation, Steed can answer all of the questions posed to him without revealing his or others’ personal adherence to any particular religious beliefs. *See* Steed Transcript at 41:14-54:7.

⁵ Steed fails to identify how the First Amendment applies to each and every question posed to him by Wage Hour. Each of Wage Hour’s questions is clearly articulated from pages 41 to 57 of the transcript. Petitioner takes the position that the First Amendment is inapplicable to each and every question. Steed has made no showing otherwise on a question by question or any other basis.

Steed is not claiming that the First Amendment privilege attaches to any specific request made by Wage Hour, and he does not claim that any of the questions would force him to reveal his beliefs. Rather, he argues that the privilege attaches to all questions that Wage Hour asked him that in any way involve the FLDS church on the basis that answering them would infringe on his closely held religious belief in secrecy. Notably, Steed has failed to cite any authority supporting his position. Although convenient, this is a misuse and overbroad assertion of the First Amendment.

iii. Steed Has Failed to Make a Prima Facie Showing of First Amendment Infringement

In the Tenth Circuit, the party claiming a First Amendment privilege bears the initial burden of establishing the factual predicate for the privilege and making a prima facie showing of the privilege's applicability. *See In re Motor Fuel Temperature Sales Practice Litigation*, 641 F.3d 470, 488 (10th Cir. 2011). It is only after a party has made a prima facie showing of infringement that the burden shifts to the government to make the appropriate showing of need for the material. *See In re First Nat'l Bank, Englewood, Colo.*, 701 F.2d 115, 118 (10th Cir. 1983).

Steed asserts that the government's questions infringe on his First Amendment rights based on his religious belief in secrecy of church affairs.⁶ This general assertion is insufficient to make the requisite prima facie showing. Although Steed asserts religious grounds to support his refusal to testify, he has gone no further than merely reciting the word "religion" (or

⁶ Steed also makes a generic statement that compelling him to answer Wage Hour's questions would have a chilling effect on other FLDS members, but this statement is not supported by any factual assertions or legal authority to show how it implicates his alleged First Amendment privilege under the facts of this case.

“religious vows” and “religious beliefs”). “The mere assertion of generic religious objections is not sufficient to invoke first amendment protections.” *Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989). Steed has failed to assert objective and articulable facts or to make an evidentiary showing of any kind of First Amendment infringement to satisfy his prima facie burden. *See In re Motor Fuel*, 641 F.3d at 489. In addition to finding that Steed failed to establish a bona fide religious belief and that his assertion of the First Amendment privilege is overbroad, the Court should also find that Steed failed to make a prima facie showing of infringement.

iv. Petitioner Has a Compelling Interest in the Information Sought

Even if the Court finds that Steed made a prima facie showing of First Amendment infringement, the government’s compelling interest in protecting the health, safety and welfare of children and enforcing the country’s child labor laws outweighs Steed’s alleged religious belief in privacy. *See Price v. Massachusetts*, 321 U.S. 158, 168-70 (1944). The government’s need for the information sought from Steed is of overwhelming significance under the circumstances.

As stated above, Wage Hour has video footage of FLDS children picking pecans, testimony from a member of the church stating that up to 1,400 FLDS children were involved in child labor activities, and a voicemail message that suggests that the FLDS church organized and facilitated the use of child labor in a large scale pecan harvest. Wage Hour needs to be able to ask questions of Steed and other witnesses to develop an understanding of the church’s corporate structure, its status as an employer under the FLSA, and its participation in the pecan harvest. The government’s interest in investigating credible allegations of child labor that implicate up to 1,400 children far outweighs Steeds interest in maintaining secrecy surrounding all church matters. *See In re Grand Jury Proceedings of John Doe v. United States*, 842 F.2d 244 (10th Cir.

1988) (finding that a witness' refusal to testify based on alleged fundamental religious beliefs that prohibit him from being compelled to testify against members of his family was outweighed by the government's interest in investigating crimes and enforcing laws).

B. THE COURT SHOULD COMPEL VERGEL STEED'S TESTIMONY AND FIND STEED IN CIVIL CONTEMPT IF HE REFUSES TO TESTIFY

Petitioner requests that the Court enter an order denying Steed's motion and compelling Steed to answer the questions asked of him by Wage Hour as set forth on pages 41-57 of the transcript, as well as any necessary follow up questions. Should Steed continue to refuse to cooperate with Wage Hour's investigation and provide testimony in accordance with the subpoena Petitioner requests that the Court: (1) hold Steed in civil contempt and impose a fine of \$1,000 day and incarceration until he agrees to comply with the subpoena; and (2) order Steed to reimburse the Secretary for all travel costs associated with traveling to Salt Lake City both on January 6, 2014, and on a date set in the future for Steed's continued testimony, based on the waste of government resources due to Steed's refusal to cooperate.

V. CONCLUSION

WHEREFORE, the Secretary prays that this Court DENY Steed's Motion to Sustain Objections to Questions Posed During Subpoena Testimony on January 6, 2014, and Memorandum in Support (Doc. 73) and issue an order compelling Steed's testimony, and other relief as requested.

DATED this 10th day of February, 2014.

Respectfully submitted,

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