UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

SEAFOOD PEDDLER OF SAN RAFAEL, INC., dba SEAFOOD PEDDLER; ALPHONSE SILVESTRI; RICHARD MAYFIELD; FIDEL CHACON,

Defendants.

Case No. 12-cv-00116 WHO (NC)

SECOND ORDER RE: DISCOVERY DISPUTES

Re: Dkt. Nos. 110, 133, 134, 138, 139

Plaintiff and defendants continue to dispute numerous discovery issues, including whether the Court should allow discovery regarding the immigration status of witnesses. The Court held a hearing on August 28, 2013, addressing all unresolved disputes. Based on the parties' submissions and the arguments of counsel at the hearing, the Court orders as follows:

1. IDENTIFICATION OF CONFIDENTIAL INFORMANTS.

In her March 29, 2013, order, Judge Hamilton ordered plaintiff to identify confidential informants by August 20, 2013. Dkt. No. 92 at 2; *see also* Dkt. No. 81. The Court explained that "plaintiff has conceded that, at some point in the case, the need for the

parties to prepare for trial will outweigh her qualified privilege to withhold the informants' identities. Thus, the only remaining issue for the court to decide is when that balance-shifting occurs." Dkt. No. 92 at 2.

Plaintiff now seeks an extension of the August 20 deadline because of defendants' "brazen attempts to threaten and intimidate employees from participating in this case." Dkt. No. 139 at 3. In setting this deadline, however, Judge Hamilton already considered the arguments made by plaintiff regarding the threat of retaliation by defendants and carefully weighed the competing interests. *See* Dkt. Nos. 81, 92. Plaintiff has not presented any new material facts or a change of law, or any other reason justifying a reconsideration of Judge Hamilton's March 29 order. *See* Civil L.R. 7-9(b). Plaintiff argues that the chilling effect of the subpoena issued by defendants to Martin Flores, former Seafood Peddler employee Hector Hernandez's supervisor at Hernandez's current employer, justifies continued application of the informant's privilege. Dkt. No. 139 at 3-4. However, this Court substantially limited the subpoena and could grant appropriate relief against abusive subpoenas in the future if necessary. *See* Dkt. No. 111.[1]

In connection with the request for extension of the August 20 deadline, plaintiff filed a motion for administrative relief under Civil Local Rule 7-11 seeking in camera review by the Court of the declarations of two non-party employee witnesses, submitted to show a fear of retaliation if their names are revealed. Dkt. No. 138; *see Solis v. Best Miracle Corp.*, No. 08-cv-0998 CJC (MLG), 2009 WL 3709498, at *2 (C.D. Cal. Nov. 3, 2009) (granting motion for protective order to prevent disclosure of employee-informants and stating that "after *in camera* review of Plaintiff's sealed declarations, including declarations from former employees, the Court concludes that Plaintiff has met her burden to demonstrate that the informers have an objectively reasonable fear of retaliation."). Defendants oppose the

[1] Plaintiff also asserts that disclosure of confidential informants at this point (21 months after filing the complaint) would be "premature" and should be postponed to a "later pretrial stage." Dkt. No. 139 at 4. Yet unless this case progresses through discovery, it may never end, frustrating the desired "just, speedy, and inexpensive" determination of every action. Fed. R. Civ. P. 1. The parties will have a further opportunity to discuss the case and trial schedule with Judge Orrick on September 24, 2013.

request for in camera review arguing that their due process rights require that they be afforded an opportunity to rebut plaintiff's evidence of retaliation. Dkt. No. 144. However, because the Court has found that the declarations submitted by plaintiff in camera do not present evidence of a threat of retaliation that justifies an extension of the August 20 disclosure deadline, there is no need for defendants to provide evidence in rebuttal.

Plaintiff's request for in camera review is granted and plaintiff must file the declarations under seal by September 13, 2013. Plaintiff's request for an extension of the August 20 deadline and for reconsideration of Judge Hamilton's March 29 order is denied. Plaintiff must identify the confidential informants as ordered by Judge Hamilton by September 24, 2013.

2. IMMIGRATION STATUS TESTIMONY.

Also pending before the Court are plaintiff's motion for protective order regarding U Visas, Dkt. No. 133, and defendants' motion regarding their request to permit deposition testimony on the subject of immigration status, Dkt. No. 134. The primary question presented by these motions is whether defendants should be allowed to obtain discovery concerning the immigrations status of witnesses. This issue was addressed in Judge Hamilton's March 29 order. Dkt. No. 92. That order states that "defendants may not ask any witness what their immigration status is, but to the extent that plaintiff objected to 'indirect' questions that may have some bearing on immigration status, that objection was overruled." *Id.* at 3:9-12. The order further states that "if plaintiff's investigator injects this subject during the course of his deposition, defendants are permitted to ask follow-up questions of either the investigator himself or of any witnesses implicated by the investigator's statements." *Id.* at 3:12-14.

Plaintiff now contends that the March 29 order barring defendants from "ask[ing] any witness what their immigration status is" applies to questions to any witness about the immigration status of the witness himself or of any other person. Dkt. No. 133 at 11-12. The reason underlying the prohibition against questions about employees' immigration

status is to avoid the chilling effect such disclosure could have upon their ability to effectuate their rights, as acknowledged by the Ninth Circuit in *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064-70 (9th Cir. 2004); *see* Dkt. No. 66 at 17:15-19. The Court agrees with plaintiff that the chilling effect from such disclosure is present not only when the inquiry is to an employee directly, but also when defendants are allowed to ask someone else about that employee's immigrations status. Accordingly, the March 29 order should be so interpreted.

Plaintiff also requests a protective order prohibiting defendants from inquiring into whether any witness or any other person in this case has filed a U Visa petition or from seeking any information about U Visa petitions. Dkt. No. 133 at 6, 12-20. The Victims of Trafficking and Violence Protection Act of 2000 "permits nonimmigrants (undocumented immigrants) who are victims of serious crimes and who assist law enforcement in investigating and prosecuting those crimes to apply for and receive 'U' visas." *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 871 (N.D. Cal. 2008) (citing 8 U.S.C. §§ 1101(a)(15)(U), 1184(p), and 1255(m)).[2] Plaintiff contends that questions about whether or not an employee applied for, or was offered a U Visa, as well as inquiries as to the substance of U Visa applications, would necessarily result in a direct inquiry into employees' current immigration status expressly prohibited by the March 29 order. Dkt. No. 133 at 13. While the Court agrees, this does not resolve the issue before it.

The Court's task is to balance the chilling effect from the disclosure of employees' immigration status against defendants' interests in obtaining the information. *Rivera*, 364 F.3d at 1064. The March 29 order clarified that discovery as to employees' immigration status could be appropriate if that subject is "injected" by plaintiff's investigator. Dkt. No. 92 at 3:9-12. This clarification was in response to an issue raised by Seafood Peddler at the

[2] Plaintiff's request for judicial notice related to the subject of U Visas, Dkt. No. 110, is granted as to the existence of the documents but not as to the truth of their contents. *See* Fed. R. Evid. 201(b); *Lee v. City of Los Angeles*, 250 F.3d 668, 688-90 (9th Cir. 2001). The Court takes judicial notice only for the purposes of this order, and does not address the authenticity or admissibility of any of the documents as exhibits at trial.

February 20, 2013, hearing before Judge Hamilton where it argued that "clearly immigration status is now relevant because of the U-Visa issue that was introduced by the investigator saying he took the statements from these witnesses in conjunction with giving them a U-Visa" and that "the investigator testified that he – that U-Visas were used as part of the conjunction [sic]." Dkt. No. 90 at 52:17-54:1. Seafood Peddler then asked if defendants were allowed "to ask questions about the U-Visa process in the meetings that they got the visas." *Id.* While Judge Hamilton explained that she expected the parties would resolve these issues by themselves, she also stated that, if plaintiff's investigator "injected the subject during the course of his deposition," defendants can ask follow-up questions of him and the witnesses. *Id.*

The parties now dispute whether plaintiff's investigator, Eastwood, "injected" the immigration status subject within the meaning of Judge Hamilton's order. Eastwood testified that (1) one of his DOL colleagues, Jennifer Tse, was involved with the Seafood Peddler case "to the extent necessary to coordinate any U-visa applications for certification," Dkt. No. 146-2 at 3:1-6:16, and that (2) a meeting was held at the Guatemalan consulate in San Francisco at which Eastwood, Ramon Hueracha, a Regional Office Coordinator in charge of the U Visa program, and former Seafood Peddler employees were present, and that statements were taken from at least some of the employees at the meeting, *Id.* at 16:11-30:18. Seafood Peddler's reference at the February 20, 2013, hearing to Eastwood "saying he took the statements from these witnesses in conjunction with giving them a U-Visa," overstates his testimony. Dkt. No. 90 at 52:21-14; 53 at 17-18. At most, the testimony raises an inference that U Visas were a subject of discussion between plaintiff's investigator and Seafood Peddler employees.[3] It is unclear at

[3] While plaintiff argues that this evidence is irrelevant because the DOL has no authority to grant U Visas, plaintiff concedes that the DOL has a role in certifying that a U Visa applicant is a victim of a qualifying criminal activity and has been or is likely to be helpful in the investigation or prosecution of that activity. Dkt. No. 133 at 18. Plaintiff also makes much of the fact that the DOL obtained statements from defendants' employees and filed the complaint in this case before the meeting at the consulate took place. Dkt. No. 151 at 5-6. However, this fact does not preclude the possibility that there were earlier communications with Seafood Peddler employees regarding the

this point, however, whether plaintiff in any way offered, provided, or was requested to provide, U Visa certification to any Seafood Peddler employee in connection with the investigation or prosecution of this case. Moreover, even if plaintiff did so, if that employee's testimony will not be relied upon by plaintiff in this case, the Court is not inclined to find that plaintiff has "injected" the immigration status subject. Accordingly, at this stage, the Court finds that the U Visa subject has not been "injected" within the meaning of Judge Hamilton's March 29 order.

Additionally, plaintiff argues that inquiry into the U Visa subject is barred by 8 U.S.C. § 1367(a) which provides that "in no case may" the Attorney General, or any other official or employee of the Department of Justice, the Department of Homeland Security, or the Department of State "permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary" of a U Visa. Dkt. No. 133 at 14-16. This prohibition "ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted." 8 U.S.C. § 1367(a); *see also* 8 C.F.R. § 214.14(e)(2) ("Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. § 1367."). The prohibition is subject to several specific exceptions set forth in 8 U.S.C. § 1367(b)(1)-(8). Defendants do not address the statutory provision barring disclosure of information related to a U Visa beneficiary or any of the exceptions, which do not appear to apply here. Instead, they argue that they need this information because it is highly relevant to impeachment and credibility. This argument, which could be made in every case where a witness is a U Visa beneficiary, appears to be foreclosed by § 1367(a). Defendants have not cited to any authority allowing the Court to disregard the statutory mandate of non-disclosure in a case such as this one. The only civil case relied upon by defendants to

subject of U Visas.

support their request for U Visa discovery, *Camayo v. John Peroulis & Sons Sheep, Inc.*, No. 10-cv-00772 MSK (MJW), 2012 WL 5931716 (D. Colo. Nov. 27, 2012), does not address the non-disclosure provision. The criminal cases cited by defendants are also distinguishable because of the government's constitutional obligation to provide exculpatory evidence to a criminal defendant under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Defendants' argument that plaintiff here has an obligation to provide exculpatory evidence because of plaintiff's assertions that Seafood Peddler's employees were subject to threats of physical intimidation is not persuasive.

Furthermore, during Eastwood's deposition plaintiff asserted the work product privilege to a line of questions seeking to discover the identity of the group or class of individuals who made applications for U Visa certification and who were present at the Guatemalan consulate meeting. *See* Dkt. No. 143 at 22-31. Defendants now ask the Court to overrule the objections and compel answers, arguing that the questions "had nothing to do with attorney work, and according to Plaintiff, the U-Visa program is handled by a different governmental department." Dkt. No. 139 at 7. However, the deposition transcript shows that the basis for the work product objections was that the work in coordinating any U Visa applications for certification was done at the direction of counsel, Dkt. No. 143 at 24:14-25:7, and that Eastwood's conversations regarding U Visas were at the direction of counsel as well, Dkt. No. 146-2 at 12:18-14:12.

Under the work product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3), "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by

other means." Fed. R. Civ. P. 26(b)(3)(A); *see also Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947). The identity of interviewed witnesses could be deemed work product capable of revealing strategy. *See Mitchell Eng'g v. City & County of San Francisco*, No. 08-cv-04022 SI, 2010 WL 1853493, at *1 (N.D. Cal. May 6, 2010) (citing *In re MTI Tech. Corp. Sec. Litig. II*, No. 00-cv-0745, 2002 WL 32344347, at *3 (C.D. Cal. June 13, 2002)). However, if plaintiff here intends to rely on the testimony of Seafood Peddler employees with whom Eastwood discussed the subject of U Visas, those employees will likely be disclosed as confidential informants. Thus, the risk of disclosing legal strategy by compelling Eastwood to answer questions regarding the identity of witnesses is minimal and is outweighed by defendants' need to defend against the testimony of these witnesses. *See In re Harmonic, Inc. Sec. Litig.*, 245 F.R.D. 424, 429 (N.D. Cal. 2007) (granting motion to compel disclosure of identities of confidential witnesses); *In re Connetics Corp. Sec. Litig.*, No. 07-cv-02940 SI, 2009 WL 1126508 (N.D. Cal. Apr. 27, 2009) (same). Similarly, even if the number of U Visa applications could be considered work product, *see* Dkt. No. 143 at 26, it is primarily factual and of minimal substantive content, and it is thus outweighed by the need for discovery.

In conclusion, defendants may not ask questions of witnesses regarding U Visas unless (1) there is a factual basis showing that plaintiff offered, provided, or was requested to provide, U Visa certification to any Seafood Peddler employee in connection with the investigation or prosecution of this case; (2) that employee's testimony will be relied upon by plaintiff in this case; and (3) the employee is not a U Visa beneficiary within the meaning of § 1367(a)(2).

3. ADDITIONAL DISCOVERY ISSUES RAISED BY PLAINTIFF.

(A) Scope of discovery.

Next, plaintiff contends that the DOL is entitled to discovery concerning all of defendants' employees, not only the fourteen identified in the complaint and/or Exhibit A. Dkt. No. 139 at 1-2. At the hearing, plaintiff stated that the DOL requested this discovery

in November 2012 and has been meeting and conferring with defendants about this issue since that time. Defendants oppose the request on the basis that, at a hearing held on October 31, 2012, plaintiff answered in the affirmative Judge Hamilton's question of whether "the Secretary's action [is] brought solely on behalf of the 14 people that are listed," and that defendants would be prejudiced by plaintiff's change of position. Dkt. Nos. 66 at 10:4-9; 139 at 5-6. Plaintiff responds that the statement made to Judge Hamilton was meant to clarify only that "at the time the complaint was filed, the 14 named employees were the only ones for whom the Secretary was aware of being owed back wages." Dkt. No. 139 at n.1. It appears that the statement was made during arguments regarding the informant's privilege and the immigration status issues, and was thus not intended to address the overall scope of discovery. *See* Dkt. No. 66 at 2-3. In light of that, plus the fact that plaintiff requested the discovery many months ago, and that defendants have not shown prejudice, the Court finds that discovery is not limited per se to the fourteen individuals identified in the complaint. This does not mean, however, that plaintiff is entitled to unlimited discovery as to all Seafood Peddler employees.

(B) Requests for defendants' tax returns and bank statements.

Plaintiff contends that defendants should be compelled to produce tax returns or bank statements for Seafood Peddler and the individual defendants. Dkt. No. 139 at 2. It is unclear whether this request is limited in time. Plaintiff argues that Seafood Peddler's tax returns are relevant to Seafood Peddler's claim that the restaurant was forced to terminate employees in July 2011 because business was slow. *Id.* With respect to the individual defendants, plaintiff argues that their tax returns are relevant to the assertion that they are independent contractors. *Id.* Defendants respond that tax returns do not provide monthly financial data and disclosure will not show the alleged slowdown in July 2011. *Id.* at 6. Defendants suggest that if the Court were to order disclosure, the returns be submitted to the Court for in camera review "for the sole purpose of determining whether the returns show the individuals as employees of Seafood Peddler (i.e. whether W-2's are shown on the

returns." *Id.*

Under federal law, courts apply a two-part test to balance the need for discovery with the public policy favoring confidentiality of tax returns. The court must find (1) that the returns are relevant to the subject matter of the action; and (2) that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable. *Karnazes v. County of San Mateo*, No. 09-cv-0767 MMC (MEJ), 2010 WL 1910522, at *5 (N.D. Cal. May 11, 2010) (citations omitted). The same test is applied to determine whether a party should have to disclose other financial information, such as financial statements. *Id.* In light of the limited relevance of the tax returns asserted by plaintiff here, plaintiff's failure to show that the information cannot be obtained by less intrusive means such as an interrogatory or deposition, or that the information is likely to be gleaned from the requested tax returns, the Court finds that plaintiff has not justified the need for the production of tax returns or bank statements. This request is therefore denied.

(C) Requests for information and records relating to purveyors and suppliers.

Plaintiff seeks to compel defendants to produce "records relating to purveyors and suppliers" on the ground that such records are relevant to "ascertaining the identity of employees, their hours and days worked, and the restaurant's business volume and sales." Dkt. No. 139 at 2. The Court agrees with defendants that plaintiff has not demonstrated why the records regarding the suppliers of the restaurant would show any of this information. *Id.* at 7. It is also unclear why this information is necessary in light of the discovery already obtained by plaintiff from defendants to date. Accordingly, plaintiff's motion to compel "records relating to purveyors and suppliers" is denied.

(D) Requests for additional time/sales records.

The letter brief states that plaintiff has requested Kronos time/sales records, which are records of individual food orders of restaurant customers for preparation by kitchen staff, which purportedly show exact hours of daily food service, employees' time and attendance, and restaurant sales. Dkt. No. 139 at 3. The letter brief further asserts that "Defendants

have failed to state whether such documents exist, whether they will be produced, or whether any attempt has been made to determine if they exist." *Id.* It appears that this issue is not ripe for resolution by the Court. The parties have until September 24, 2013, to complete the meet and confer process and submit a joint letter to the Court for resolution if agreement is not reached.

(E) Requests for the work plans about which Fidel Chacon testified at deposition.

Plaintiff contends that defendants agreed to produce, without objection, all work plans that defendant Fidel Chacon testified about during deposition, and that defendants have not produced those documents or stated whether any attempt has been made to locate and produce them. Dkt. No. 139 at 3. It appears that this issue is not ripe for resolution by the Court. The parties have until September 24, 2013, to complete the meet and confer process and submit a joint letter to the Court for resolution if agreement is not reached.

3. ADDITIONAL DISCOVERY ISSUES RAISED BY DEFENDANTS.

(A) Indirect immigration status questions.

Defendants assert that plaintiff "continues to instruct witnesses not answer questions which indirectly relate to immigrations status," such as questions regarding their aliases, place of birth, social security number, prior places of employment and/or residences. Dkt. No. 139 at 5. In support of this assertion, defendants have cited only to excerpts from the deposition transcript of Hector Hernandez. Dkt. No. 140 at 5-7. Defendants contend that plaintiff's objections to such indirect questions are improper because "Judge Hamilton has ruled that the only question that defendants may not ask is what that witnesses [sic] 'immigration status is.'" Dkt. No. 139 at 5. First, the Court disagrees with this interpretation of Judge Hamilton's March 29 order. While Judge Hamilton overruled plaintiff's objection to indirect questions which may have some bearing on immigration status, she did not hold that *all* such questions were permissible. Dkt. No. 92 at 3:9-12. At the October 31, 2012, hearing, Judge Hamilton explained that "questions that don't go

directly to what [the witnesses'] immigration status is *but go to other issues that are relevant in this case* are permissible." Dkt. No. 66 at 26:9-11 (emphasis added). For example, Judge Hamilton explained that the question of aliases "would be an appropriate question with regard to people who are specifically listed as having been [Seafood Peddler] former employees for whom you have no record," not that such a question was always appropriate. *Id.* at 27:14-19. Second, defendants have not provided adequate justification to compel answers by Hernandez (or any other witness) to the indirect immigration status questions asked at his deposition as they have not explained why those questions are relevant to an issue in this case, and not simply an end-run around the prohibition against direct immigration status questions. Defendants' present request to compel answers to indirect immigration status questions is denied.

(B) Addresses for the 14 named employees.

By September 24, 2013, plaintiff must either comply with Judge Hamilton's order to provide this information to defendants, provide a statement to defendants that plaintiff has no such information, or face sanctions for failure to follow court orders. *See* Dkt. Nos. 90 at 48; 92 at 2:24-26.

(C) Dispute regarding discovery of electronic data.

The letter brief indicates that the parties are continuing to meet and confer on this issue. Dkt. No. 139 at 6. The parties have until September 24, 2013, to complete the meet and confer process and submit a joint letter to the Court for resolution if agreement is not reached.

(D) The deposition of Victor Viera.

The letter brief states that the parties have agreed to continue to meet and confer on this issue with the hope that it can be resolved informally. Dkt. No. 139 at 6. The parties have until September 24, 2013, to complete the meet and confer process and submit a joint letter to the Court for resolution if no agreement is reached.

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4. CONCLUSION.

With respect to the issues identified above as not ripe for resolution, if the parties are unable to resolve their outstanding disputes and decide to present their disputes to the Court, they must do so in a single joint letter brief not exceeding 5 pages.

Any party may object to this nondispositive pretrial order within 14 days of the filing date of this order. *See* Civ. L.R. 72-2.

IT IS SO ORDERED.

Date: September 10, 2013

Nathanael M. Cousins
United States Magistrate Judge