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18 UNITED STATES DISTRICT COURT FOR THE  
 19 NORTHERN DISTRICT OF CALIFORNIA

20 **THOMAS E. PEREZ**, Secretary of )  
 21 Labor, United States Department of )  
 22 Labor, )

23 Plaintiff,

24 v.

25 **NATIONAL CONSOLIDATED** )  
 26 **COURIERS, INC.**, a corporation, and )  
 27 **TANWEER AHMED**, an individual )

28 Defendants. )

Case No.: 3:15-cv-1026

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 PETITION TO ENFORCE  
 ADMINISTRATIVE SUBPOENAS  
 AND IN SUPPORT OF  
 APPLICATION FOR TRO**

1 Plaintiff Thomas E. Perez, United States Secretary of Labor (“Secretary”),  
2 submits this memorandum of law in support of his application for a temporary  
3 restraining order (“TRO”) and concurrent petition to enforce administrative subpoenas  
4 (“Petition”). To address the document destruction which has already occurred and to  
5 address the imminent threat of continuing document and evidence destruction, the  
6 Secretary asks this Court to enjoin and restrain Defendants Tanweer Ahmed (“Ahmed”)  
7 and National Consolidated Couriers, Inc. (“NCCI”) (and its officers, agents, employees,  
8 etc.) from: (1) continuing to destroy evidence necessary to the Secretary’s investigation  
9 into NCCI for violations of the Fair Labor Standards Act (“FLSA”); and (2) further  
10 interfering with the Secretary’s investigation through other spoliation of evidence, the  
11 suborning of false testimony, retaliation and intimidation of witnesses.

## 12 I. INTRODUCTION

13 The Secretary seeks immediate and extraordinary relief to address extraordinary  
14 conduct by Defendants in response to a typical investigation commenced by the  
15 Secretary into potential violations of the FLSA. 29 U.S.C. § 211(a). As part of this  
16 investigation, as is also customary practice, the Secretary issued administrative  
17 subpoenas seeking documents and testimony from Defendants.<sup>1</sup> 29 U.S.C. §§ 209,  
18 211(a) (expressly authorizing the Secretary to issue subpoenas and secure the production  
19 of information).

20 In response to the Secretary’s subpoenas, Defendants NCCI and Ahmed chose not  
21 just to *not* comply, but to *explicitly instruct NCCI staff to destroy responsive documents*  
22 *and to lie to the Secretary’s investigators*. Shockingly, the Secretary has received  
23 information that the Defendant Ahmed issued this order on the same day that the

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25 <sup>1</sup> NCCI is a courier company headquartered in San Leandro with clients and  
26 locations throughout Northern California. The Secretary’s investigation into potential  
27 underpayment of minimum wages, overtime pay and the failure to maintain complete  
28 and accurate records has focused its attention on the threshold question of whether  
Defendants have improperly classified their couriers as independent contractors rather  
than as employees.

1 Secretary's counsel conducted an administrative deposition of Mr. Ahmed and spent  
2 hours questioning him regarding the documents subpoenaed and explaining the  
3 significance of these documents to the Secretary's investigation. Declaration of Mary  
4 Pham, ¶¶ 4-7.

5 In light of this imminent threat to the Secretary's investigation and the immediacy  
6 of Defendants' orders to its staff to destroy documents and otherwise impede the  
7 Secretary's investigation, the Secretary moves for temporary relief in conjunction with  
8 the subpoena enforcement action to address these unusual and extraordinary harms  
9 caused by Defendants' conduct. To prevent further document destruction and to give the  
10 Secretary an opportunity to try to recover any documents already destroyed by  
11 Defendants, the Secretary asks the Court to issue an order permitting the United States  
12 Marshals to enter Defendants' facilities to secure Defendants' computers and any  
13 backup drives or backup electronic media for imaging.<sup>2</sup> The Secretary also asks the  
14 Court to order Defendants to comply with the subpoenas both by producing all  
15 responsive documents (as typically requested in a subpoena enforcement action) *and*  
16 *refraining from conduct which interferes with the Secretary's subpoenas*, including  
17 continuing to destroy documents, directing others to destroy evidence, and instructing  
18 employees to provide false information to the Secretary's investigators.

19 There can be no doubt of the likelihood of success on the Secretary's motion for  
20 subpoena enforcement. It is long-settled that an administrative agency's rapid exercise  
21 of its power to investigate forms the "very backbone of [its] effectiveness in carrying out  
22 [its] congressionally mandated duties," Fed. Mar. Comm'n v. Port of Seattle, 521 F.2d  
23 431, 433 (9th Cir. 1975), and for this reason, administrative subpoena enforcement  
24 actions are "summary" proceedings. E.E.O.C. v. St. Regis Paper Co., 717 F.2d 1302,

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27 <sup>2</sup> The Secretary has contacted the U.S. Marshals and has been assured that the  
28 Marshals are prepared to enter NCCI's facilities to secure the computers, backup drives  
and backup electronic media upon issuance of the proposed TRO. Declaration of  
Andrew Schultz, ¶ 3.

1 1304 (9th Cir. 1983). Under this narrow inquiry in subpoena enforcement proceedings,  
2 courts must enforce administrative subpoenas unless “the evidence sought by the  
3 subpoena [is] ‘plainly incompetent or irrelevant’ to ‘any lawful purpose’ of the agency.”  
4 Port of Seattle, 521 F.2d at 433 (quoting Endicott Johnson Corp. v. Perkins, 317 U.S.  
5 501, 509 (1943)). The evidence the Secretary’s subpoenas sought from Defendants here  
6 easily satisfies this lenient standard.

7 The Secretary seeks the proposed temporary restraining order out of necessity.  
8 Absent the issuance of such immediate injunctive relief, the Secretary’s entire  
9 investigation and any later order by this Court enforcing the subpoenas will be rendered  
10 a futile exercise. The Secretary reasonably fears that the evidence sought in these  
11 subpoenas will soon be fully irretrievable. Further, without an order prohibiting Ahmed  
12 from engaging in further intimidation of his subordinates at NCCI, the Secretary will be  
13 unable to obtain the information sought by the subpoenas.

14 Unless the subpoenas are enforced and Defendants are immediately enjoined and  
15 restrained, the Secretary, the employees who have worked for NCCI and who may be  
16 owed back wages under the FLSA, and the public interest will suffer irreparable injury.  
17 Defendants cannot be permitted to continue to destroy evidence, to openly flout their  
18 obligation to respond to the subpoenas, and to intimidate NCCI employees from  
19 participating in the investigation. The Court should grant the Secretary’s Petition and  
20 proposed TRO. Given the extreme and patently unlawful actions taken by Defendants to  
21 hamper the Secretary’s investigation at all costs, time is of the essence.

## 22 II. FACTUAL BACKGROUND

### 23 A. NCCI Failed to Produce Records Responsive to the Administrative Subpoena 24 *Duces Tecum*

25 As part of the Secretary’s investigation, on July 29, 2013, an investigator served a  
26 subpoena *duces tecum* on NCCI requesting documents, including communications,  
27 NCCI’s payroll records, and a complete list of current and former courier drivers from  
28 March 3, 2010 to present. See Declaration of Ruben Rosalez, ¶ 4. The subpoena

1 required NCCI to appear and produce records on August 21, 2013 at 10:00 am. Id.  
 2 Among the documents NCCI was required to produce were email communications  
 3 relating to the Secretary’s investigation. See Exhibit A to Petition. NCCI has not  
 4 produced any email communications from Ahmed’s email account, and the Secretary  
 5 has independently gathered only a handful of email communications from NCCI  
 6 personnel in his investigation. See Declaration of Natalie Nardecchia, ¶ 8 and exhibits  
 7 thereto.<sup>3</sup> Through his investigation the Secretary has learned that NCCI personnel use  
 8 email communications throughout the day, on a daily basis, to conduct their operations  
 9 and issue directives. Id. The emails are critical to NCCI’s operations and NCCI’s and  
 10 Ahmed’s relationship to NCCI’s workers and are therefore an essential piece of the  
 11 Secretary’s investigation into FLSA violations. See id. Ahmed had at least two email  
 12 addresses at NCCI: [tanweer@nccus.com](mailto:tanweer@nccus.com) and [tanweer3@nccus.com](mailto:tanweer3@nccus.com). Id.

13 **B. The Secretary Served a Litigation Hold Letter on Defendant Ahmed and**  
 14 **NCCI Agents and Employees on December 18, 2014**

15 On December 18, 2014, the Secretary mailed a litigation hold notice letter to  
 16 Defendant Ahmed and various other agents, personnel, and/or custodians of records at  
 17 NCCI. See Nardecchia Decl., ¶ 2 and exhibits thereto. The letter made clear that NCCI  
 18 is under federal investigation for violations of the FLSA and that as potential litigants,  
 19 “NCCI and its agents, officers, representatives, employees, custodians, contractors,  
 20 successors, parties in interest . . . are under an obligation to preserve and not destroy such  
 21 evidence.” Id. The letter specifically referred to the duty to save and not destroy  
 22 “electronically stored data, text messages, emails, and files . . . .” Id.

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27 <sup>3</sup> Notably, these limited emails demonstrate that Defendant Ahmed issued  
 28 directives to his subordinates, including how much to pay all NCCI personnel and that  
 drivers should be paid for fuel – and that Ahmed would audit these payments.

1 **C. Defendant Ahmed Failed to Produce Records Responsive to the**  
2 **Administrative Subpoena *Duces Tecum*; Instead, He Ordered Destruction of**  
3 **Documents and Repeatedly Provided False Information to the Secretary**

4 On January 16, 2015, the Secretary served Ahmed with a subpoena requiring him  
5 to appear for an administrative deposition on January 30, 2015 and produce records. See  
6 Rosalez Decl., ¶ 5. The subpoena called for the production of documents, including  
7 communications (such as emails or text messages) in Ahmed's possession, custody or  
8 control related to the Secretary's investigation into NCCI. Exhibit B to Petition. Ahmed  
9 has not, to date, produced any email communications or text messages that the Secretary  
10 requested in the subpoenas. Nardecchia Decl. at ¶ 7. Ahmed conceded during his  
11 administrative deposition, however, that he has, for years, regularly communicated with  
12 NCCI employees by email and text message. Id.

13 On January 27-28, 2015, Ahmed twice provided false, fabricated travel itineraries  
14 to the Secretary by email, in an attempt to evade appearing for his deposition or  
15 producing records. See Nardecchia Decl., ¶ 4-5. On January 27, 2015, three days before  
16 his scheduled deposition, Ahmed sent to the Secretary, through his counsel, Stephen  
17 Hunt, a flight itinerary that is – on its face – forged. Id. Ahmed claimed that the  
18 itinerary was for his travel from Houston to Pakistan, leaving January 28, 2015. Id.  
19 However, on the itinerary, there is a purported *month-long* flight from Houston to  
20 Istanbul (departing January 28, arriving February 26), and then a connecting flight from  
21 Istanbul to Lahore departing on a *non-existent* date of February 29, 2015. Id. After the  
22 Secretary pointed out to Mr. Hunt that the itinerary was fabricated, the next day, January  
23 28, 2015, Ahmed provided a second forged flight itinerary, claiming the ticket had been  
24 purchased on January 7, 2015 when it was actually purchased the morning of January  
25 28, 2015. Id. When this fabrication was again pointed out by the Secretary, Ahmed  
26 simply chose to not appear on January 30, 2015 and a notice of non-appearance was  
27 entered on the record. Nardecchia Decl., ¶ 6. Ahmed later admitted that he went to Las  
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1 Vegas, purportedly for a “board meeting” for his work as an officer of Kentucky Fried  
2 Chicken, on January 30, 2015 instead of appearing for his deposition. Id.

3 On February 6, 2015 and February 8, 2015, Ahmed instructed his subordinate,  
4 Amira Khalaf, to send by email some documents responsive to the subpoena issued to  
5 Ahmed. Nardecchia Decl., ¶ 7. These included only five categories of documents  
6 regarding NCCI: tax returns; accounts receivable; profit and loss statements; balance  
7 sheets; and “Independent Contractor Report[s].” Id. Notably, Ahmed failed to produce  
8 the majority of the documents requested in the subpoena, including but not limited to  
9 electronically stored information such as emails, text messages, and other records. Id.  
10 The Secretary has obtained, through other sources, a small amount of emails to and from  
11 Ahmed – but Ahmed, instead of producing the emails, ordered them destroyed.  
12 Nardecchia Decl., ¶ 8; Pham Decl. ¶¶ 4-7.

13 On February 9, 2015, Ahmed finally appeared for his administrative deposition in  
14 Los Angeles, California. Nardecchia Decl., ¶ 3. During the deposition, the Secretary  
15 again provided Ahmed with the December 18, 2014 litigation hold letter, which he  
16 denied having received previously – falsely claiming that the address on the letter was  
17 incorrect because there was no suite number for his office.<sup>4</sup> Id. This letter was made an  
18 exhibit to the deposition. Id. Mr. Ahmed confirmed during deposition his understanding  
19 that he was obligated to preserve evidence. Id.

20 During a lunch break in the February 9 deposition, however, at approximately  
21 12:00 pm, **Ahmed called his information technology (“IT”) employee or agent, John**  
22 **Prieto (“Prieto”), and instructed Prieto to delete Ahmed’s email accounts and mail**  
23 **boxes associated with them.** Pham Decl., ¶ 5; Statement of John Prieto (“Prieto Stmt.”)  
24 (Attachment A to Pham Decl.). Ahmed further told Prieto that he would purchase  
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28 <sup>4</sup> This claim is untrue because every listed address for Mr. Ahmed –including on  
his and NCCI’s federal income tax returns provided to the Secretary – contains the suite  
number listed on the letter sent to him. Moreover, the address on the December 18,  
2014 letter is correct.

1 Prieto's plane ticket from Houston to California (where the vast majority of NCCI's  
2 computers are located) and that Prieto could return to Houston on Sunday morning,  
3 February 15. Prieto Stmt., p. 2.

4 Prieto has worked for Ahmed for approximately 15 years, performing various IT  
5 services for Ahmed personally and for Ahmed's businesses, including NCCI and Pak  
6 Foods, also owned by Ahmed. Prieto Stmt., pp. 1, 3. Prieto has accessed NCCI's  
7 computers numerous times and he is the professional that NCCI's employees call when  
8 there is a computer problem. *Id.*; Pham Decl., ¶ 6.

9 **D. On February Defendant Prieto Carried Out Defendant Ahmed's Directive to**  
10 **Destroy Evidence Contained on NCCI Computers**

11 On February 11, 2015, Prieto arrived at NCCI's San Leandro location, where  
12 many of its employees and computers are located. Prieto Stmt.; Pham Decl., ¶ 7. NCCI  
13 has various locations, but the San Leandro location is the operational center and where  
14 Ahmed has his office and a computer. Pham Decl., ¶ 7.

15 When he arrived at the San Leandro location, Prieto stated that he was coming to  
16 check the system and to fix some problems. *Id.* While he was at NCCI's San Leandro  
17 location, Prieto accessed various employees' computers in the San Leandro facility. *Id.*  
18 All of these computers are owned by NCCI and contain documents relating to the work  
19 performed by NCCI employees. *Id.* **After Prieto accessed one employee's computer,**  
20 **all of his emails were destroyed and deleted** – to the employee's distress. *Id.*

21 Before he left on February 11, Prieto said that he would return on February 13,  
22 2015 and that he would be going to NCCI's San Jose location; it is unknown if Prieto  
23 destroyed additional documents at San Jose or any other NCCI facility. Pham Decl., ¶ 8.

24 The Secretary's investigators arrived at the San Leandro facility on February 13,  
25 2015 pursuant to their investigation into NCCI. Pham Decl., ¶ 4. Prieto arrived while  
26 the Secretary's investigators were present and Prieto was informed verbally and in a  
27 cease and desist letter to refrain from further destruction of evidence. Pham Decl., ¶ 9,  
28 and Attachment B thereto.



1 **E. Defendant Ahmed Instructed His Subordinates to Provide False Testimony to**  
 2 **the Secretary in Order to Conceal his Control Over NCCI; These Witnesses**  
 3 **are Fearful of Retaliation from Ahmed and Refuse to Produce Documents**

4 Through the course of the Secretary’s investigation, confidential informants who  
 5 work for NCCI, have told Investigator Pham that they fear retaliation from Ahmed.  
 6 Pham Decl., ¶ 11. One informant has repeatedly asked if the communications from the  
 7 informant to the Secretary will be shared with Ahmed. *Id.* This informant has also  
 8 refused to provide documents to the Secretary that were subpoenaed because of fear of  
 9 consequences from Ahmed. *Id.* Two informants have been instructed by Ahmed as to  
 10 what to say or not say to DOL. *Id.* They were instructed by Ahmed to falsely state to  
 11 DOL that Ahmed was not in control of NCCI. *Id.* Ahmed contacted the informants to  
 12 instruct them to do so. *Id.*

13 Ahmed’s control over NCCI has been brought to light throughout the Secretary’s  
 14 investigation and by Ahmed’s own deposition testimony. *See Nardecchia Decl.*, ¶ 8.  
 15 Ahmed’s tactics and intimidation with his subordinates, inducing them to perjure  
 16 themselves, are an attempt to conceal this control he has exercised over the company and  
 17 its employees for years. *See id.*; *see also Pham Decl.*, ¶ 11.

18 **III. LEGAL ARGUMENT**

19 **A. The Court Should Grant the Petition to Enforce the Subpoenas**

20 As the Supreme Court held almost 70 years ago, administrative subpoenas play a  
 21 critical role in enabling the Secretary of Labor to carry out his congressionally mandated  
 22 duty to conduct investigations of possible FLSA violations. *Oklahoma Press Publishing*  
 23 *Co. v. Walling*, 327 U.S. 186, 199-201 (1946). The Court emphasized that the purpose  
 24 of such a subpoena is “to discover and procure evidence, not to prove a pending charge  
 25 or complaint, but to make one, if, in the [Secretary]’s judgment, the facts thus discovered  
 26 should justify doing so.” *Id.* at 201. Following *Oklahoma Press*, federal courts—  
 27 including the Ninth Circuit—have routinely enforced the Secretary’s administrative  
 28 subpoenas issued under the FLSA. *See, e.g., Detweiler Bros., Inc. v Walling*, 157 F.2d

1 841, 842-43 (9th Cir. 1946); Tobin v. Banks & Rumbaugh, 20 F.2d 223, 226 (5th Cir.  
 2 1953); Durkin v. Fisher, 204 F.2d 930, 933 (7th Cir. 1953); Donovan v. Mehlenbacher,  
 3 652 F.2d 228, 230 (2d Cir. 1981).

4 As noted above, because a petition brought to enforce an administrative subpoena  
 5 serves to facilitate an agency's "rapid exercise of [its] power to investigate," it is a  
 6 summary proceeding. Fed. Mar. Comm'n, 521 F.2d at 433. A court "must enforce" an  
 7 administrative subpoena unless the responding party proves that the evidence sought by  
 8 the subpoena is "plainly incompetent or irrelevant to any lawful purpose of the agency."  
 9 E.E.O.C. v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1076 (9th Cir. 2001).

10 "The scope of the judicial inquiry in an . . . agency subpoena enforcement  
 11 proceeding is quite narrow;" an agency establishes a prima facie case for enforcing an  
 12 administrative subpoena when it shows that: (1) Congress granted it the authority to  
 13 investigate; (2) the agency followed procedural requirements in issuing the subpoena;  
 14 and (3) the evidence sought in the subpoena is relevant and material to the investigation.  
 15 E.E.O.C. v. Children's Hosp. Med. Ctr. of N. Cal., 719 F.2d 1426, 1428 (9th Cir. 1983),  
 16 abrogated on other grounds by Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20  
 17 (1991). A declaration from a government official is sufficient to establish a prima facie  
 18 case for the three elements listed above. United States v. Stuart, 489 U.S. 353, 360  
 19 (1989); F.D.I.C. v. Garner, 126 F.3d 1138, 1143 (9th Cir. 1997).

20 Once the federal agency makes a prima facie showing that the administrative  
 21 subpoena should be enforced, the burden then shifts to the responding party to provide  
 22 compelling reasons why the subpoena should not be enforced or should be modified.  
 23 Children's Hospital, 719 F.2d at 1428. The only two compelling reasons for non-  
 24 enforcement are when the agency's request is overbroad or unduly burdensome. Id.

25 1. The Secretary is Able to Establish a Prima Facie Case for Enforcing the  
 26 Subpoena

27 As described in greater detail below, the Secretary is able to establish a prima  
 28 facie case for enforcing the subpoenas issued to Defendants because: (a) Congress has

1 clearly granted the Secretary the authority to investigate Defendants to determine  
2 whether Defendants have violated provisions of the FLSA; (b) the Secretary has  
3 followed the procedural requirements for issuing the subpoena; and (c) the evidence  
4 sought in the subpoenas is relevant and material to the Secretary's investigation.

5 a. Congress Has Granted the Secretary the Authority to Investigate  
6 Defendants to Determine Whether They Have Violated the FLSA

7 Section 11(a) of the FLSA authorizes the Secretary to investigate and gather data  
8 regarding wages, hours, and other conditions and practices of employment to determine  
9 whether any person has violated any provision of the FLSA or which may aid in the  
10 enforcement of the provisions of the FLSA. Under Section 9 of the FLSA, the Secretary  
11 may issue a subpoena to require the production of documentary evidence relating to any  
12 matter under investigation. 29 U.S.C. § 209.<sup>5</sup> The Secretary's authority to issue  
13 subpoenas to determine if there has been an FLSA violation is well established.  
14 Detweiler Bros., Inc. v. Walling, 157 F.2d 841, 844 (9th Cir. 1946).

15 As set forth in the declaration of Department of Labor Wage and Hour Division  
16 ("WHD") Regional Administrator Ruben Rosalez, the Secretary initiated an  
17 investigation into NCCI to determine whether any person has violated or was about to  
18 violate the FLSA during the period of March 3, 2010 to the present. See Rosalez Decl.  
19 at ¶ 2. Such an inquiry is for a purpose lawfully authorized by Congress, and is  
20 therefore legitimate and within the Secretary's authority.

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25 <sup>5</sup> 29 U.S.C. § 209 makes the provisions of Section 9 and 10 of the Federal Trade  
26 Commission Act (15 U.S.C. § 49 and 15 U.S.C. § 50, respectively), applicable to the  
27 Secretary's powers to conduct investigations under the FLSA. 15 U.S.C. § 49 provides  
28 for the issuance of subpoenas to obtain documentary evidence and, in the event of  
noncompliance, for the district court to enforce said subpoenas.



1 As such, the requested documents are integral and necessary to the investigation and  
2 must be produced. Rosalez Decl. ¶ 6.

3 For the above reasons, the Secretary has made a prima facie case for enforcing the  
4 Subpoena.

5 2. Defendants Cannot Provide Any, Much Less a Compelling Reason, Why the  
6 Subpoenas Should Not be Enforced – Ahmed Has Destroyed Evidence

7 Defendant Ahmed has intentionally destroyed evidence sought by the subpoenas.  
8 Defendants have never argued, and cannot meet their heavy burden of demonstrating,  
9 that the Secretary’s requests are overbroad or unduly burdensome. Karuk Tribe Hous.  
10 Auth., supra, 260 F.3d at 1076 (Respondent need show that “the subpoena is plainly  
11 incompetent or irrelevant to any lawful purpose of the agency.”).

12 As explained above, the subpoenaed records are narrowly tailored in both time –  
13 March 3, 2010 to the present – and scope to determine whether Defendants and related  
14 entities are in compliance with the FLSA. Obtaining these documents is necessary for  
15 the investigation, and Defendants cannot assert any compelling justification for their  
16 refusal to comply. Instead of making any attempt at production, Ahmed is ordering the  
17 systematic destruction of evidence showing his control and operation of NCCI – which  
18 goes to the heart of the investigation into FLSA violations.

19 For these reasons, and given the extreme deception and maliciousness with which  
20 Defendants have reacted to the issuance of the subpoenas, the Court should enter an  
21 order enforcing the subpoenas and also issuing the TRO. This will provide complete  
22 relief, and an opportunity for the Secretary to secure and obtain documents that are being  
23 destroyed and withheld due to Ahmed’s intimidation and interference. Accordingly, the  
24 Secretary requests that the Court grant his proposed orders, filed concurrently.

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1 **B. The Court Should Issue the Proposed TRO to Restrain Defendants from**  
2 **Further Destruction of Evidence and Interference with the Secretary’s**  
3 **Investigation**

4 Along with an order enforcing the subpoenas, the Secretary seeks a TRO. A TRO  
5 is necessary to secure electronically-stored documents responsive to the subpoenas,  
6 prevent further destruction of evidence, and address Defendants’ intimidation of  
7 witnesses and interference with the investigation. Employees and agents of NCCI who  
8 are afraid of further retaliatory intimidation by Ahmed must be enabled, through the  
9 issuance of the TRO, to provide true information and documents responsive to the  
10 subpoena.

11 The standards for issuing a TRO and a preliminary injunction are “substantially  
12 identical.” Stuhlberg Int’l Sales Co. v. John D. Brushy & Co., 240 F.3d 832, 839 n. 7  
13 (9th Cir. 2001). A party seeking a preliminary injunction under Federal Rule of Civil  
14 Procedure 65 “must establish that he is likely to succeed on the merits, that he is likely to  
15 suffer irreparable harm in the absence of preliminary relief, that the balance of equities  
16 tips in his favor, and that an injunction is in the public interest.” Am. Trucking Ass’n,  
17 Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009); see also Cal Pharms.  
18 Ass’n v. Maxwell-Jolly, 563 F.3d 847, 849 (9th Cir. 2009). Alternatively, “serious  
19 questions going to the merits’ and a hardship balance that tips sharply toward the  
20 plaintiff can support issuance of an injunction, assuming the other two elements of the  
21 Winter test are also met.” Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1132  
22 (9th Cir. 2011); Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008). A “serious  
23 question” is one on which the movant “has a fair chance of success on the merits.”  
24 Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1421 (9th Cir. 1984).

25 When, as here, injunctive relief is sought to prevent the violation of a federal  
26 statute, and the statute specifically provides for injunctive relief, the moving party need  
27 not satisfy the standard requirements for equitable relief. Trailer Train Co. v. State Bd.  
28 of Equalization, 697 F.2d 860, 869 (9th Cir. 1983), cert. den., 464 U.S. 846 (1983); see



1 also Marxe v. Jackson, 833 F.2d 1121, 1128 n.3 (3d Cir. 1987). The Secretary need not  
2 show – but does so herein out of an abundance of caution – that there is a possibility of  
3 irreparable harm before the Court can issue a temporary restraining order. Instead, the  
4 Secretary need only show that the defendant is engaged in, or about to be engaged in, the  
5 act or practices prohibited by the statute. Atchison, T. and S. F. Ry. Co. v. Lennen, 640  
6 F.2d 255, 259 (10th Cir. 1981).

7 1. The Secretary Can Establish Likelihood of Success on the Petition,  
8 Irreparable Harm, that the Balance of Equities tips Sharply in His Favor,  
9 and that an Injunction is in the Public Interest

10 The Secretary satisfies all the requirements for issuance of a TRO:

11 First, the Secretary is likely to prevail on the merits of the subpoena enforcement  
12 petition. As noted above, a subpoena enforcement action is summary in nature. The  
13 Secretary should prevail on his Petition for all the aforementioned reasons and under  
14 controlling legal authorities. See, e.g., Karuk Tribe Hous. Auth., 260 F.3d at 1076 (a  
15 court “must enforce” an administrative subpoena unless the responding party proves that  
16 the evidence sought by the subpoena is “plainly incompetent or irrelevant to any lawful  
17 purpose of the agency”). Defendants have plainly failed to comply with the subpoenas  
18 in their refusal to produce any email communications or text messages to or from  
19 Ahmed relating to NCCI. In fact, the Secretary has only obtained a handful of emails  
20 from NCCI personnel during the entire investigation. These critical documents bear  
21 directly on issues being investigated by the Secretary. Due to Defendants’ intentional  
22 destruction of emails (and likely other documents), it will take extraordinary measures to  
23 comply with the Secretary’s subpoenas. Ahmed’s stunning disregard for the law,  
24 evidenced by his direction to destroy evidence mere hours after acknowledging under  
25 oath his obligation to preserve such evidence and turn it over to the Secretary, shows that  
26 the Court should exercise its broad injunctive authority in order to vindicate the  
27 Secretary’s right to conduct a complete and timely investigation into possible violations  
28 of the FLSA.

1 Second, the Secretary will suffer irreparable harm if the Court does not issue the  
2 proposed TRO. Without swift intervention by the Court, and without a TRO to  
3 effectuate the goal of the Petition (i.e. securing and obtaining the evidence being  
4 destroyed), critical evidence will be lost. The Secretary also will be unable to secure  
5 truthful testimony and documents from NCCI personnel who are afraid of additional  
6 retaliation and intimidation from Ahmed.

7 Third, a balancing of these considerations tips wholly and decidedly in the  
8 Secretary's favor. The order sought will ensure that the Secretary is able to carry out his  
9 congressionally mandated duties. Absent the order, Defendants, will be rewarded for  
10 intentional interference and obstruction of the Secretary's investigation and for  
11 deliberately providing false information and intimidating witnesses.

12 Finally, a TRO directly serves the public interest. The Secretary is tasked with  
13 enforcing the FLSA and ensuring that employers do not gain an unfair advantage by  
14 circumventing the requirements of the FLSA. The Secretary also has the ability to  
15 obtain wages owed to workers whose rights have been violated under the FLSA. These  
16 enforcement efforts benefit the public interest. The Secretary's ability to carry out his  
17 enforcement mandate is being impeded by Defendants' actions.

18 2. The Court Has Authority to Issue a TRO to Ensure Meaningful Compliance  
19 with the Secretary's Subpoenas

20 Inherent in the Court's authority to enforce the Secretary's subpoenas is the  
21 authority to ensure that the information sought in the subpoenas is not destroyed.  
22 Indeed, the Court's power to order an individual or entity subject to Secretary's  
23 subpoena to "to produce documentary evidence . . . , or to give evidence touching the  
24 matter in question" would be meaningless if the recipient of the subpoena could, without  
25 consequence, destroy the evidence sought or otherwise take steps to prevent its  
26 production. *See* 29 U.S.C. § 209; 15 U.S.C. § 49. For this same reason, the court has  
27 the power to hold a person who fails to comply with its subpoena enforcement order in  
28 civil contempt. 15 U.S.C. § 49; *see Durkin v. Fischer*, 204 F.2d 930, 933 (7th Cir. 1953)

1 (upholding civil confinement of employer who refused to provide subpoenaed  
2 documents to the Secretary that district court ordered him to produce).

3 Here, Defendants' actions—including destroying documents requested by the  
4 Secretary's subpoenas, instructing NCCI workers to lie to the Secretary's investigators,  
5 and intimidating NCCI personnel to the point where they refuse to produce records out  
6 of fear of Ahmed—go to the core of the relief sought in the subpoena enforcement  
7 petition. Without an order preventing these acts from continuing, an order enforcing the  
8 petition would be an empty legal exercise.

9 The Court also has the power to issue the requested TRO under its inherent  
10 authority to issue orders designed to prevent and remedy the spoliation of evidence. The  
11 Ninth Circuit has made clear that district courts may impose sanctions as part of their  
12 inherent power to manage their own affairs so as to achieve the orderly and expeditious  
13 disposition of cases. Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993). To that  
14 end, “[t]he district courts’ inherent power to sanction may be invoked in response to  
15 destruction of evidence . . . . If a party breaches its duty to preserve evidence, the  
16 opposing party may move the court to sanction the party destroying evidence.” In re  
17 Napster, Inc. Copyright Litig., 462 F.Supp.2d 1060, 1066 (N.D. Cal. 2006). “Sanctions  
18 may be imposed against a litigant who is on notice that documents and information in its  
19 possession are relevant to litigation, or potential litigation, or are reasonably calculated  
20 to lead to the discovery of admissible evidence, and destroys such documents and  
21 information.” Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455  
22 (C.D. Cal. 1984). A litigant is “under a duty to preserve what it knows, or reasonably  
23 should know, is relevant in the action, is reasonably calculated to lead to the discovery  
24 of admissible evidence, is reasonably likely to be requested during discovery, and/or is  
25 the subject of a pending discovery request.” Id.; see also Apple, Inc. v. Samsung  
26 Electronics Co. Ltd., 888 F.Supp.2d 976, 991 (N.D. Cal. 2012).

27 In this case, Defendants were clearly put on notice of the duty to preserve  
28 evidence, including emails and text messages. Defendant Ahmed acknowledged this

1 duty under oath – and then immediately ordered destruction of the evidence specifically  
2 requested in the subpoenas. Nardecchia Decl., ¶¶ 2-3; Pham Decl. ¶¶ 4-7. Given the  
3 intentional and malicious nature of these acts of spoliation, the Court has the power to  
4 take appropriate remedial action, including an order allowing the government to secure  
5 Defendants’ computers to allow recovery of the subpoenaed documents; and prohibiting  
6 NCCI and Ahmed from taking further steps to intimidate or dissuade NCCI personnel  
7 from complying with the Secretary’s subpoenas.<sup>6</sup>

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21 <sup>6</sup> The Court also enjoys jurisdiction under the FLSA to enjoin violations of  
22 Section 15(a)(3) of the FLSA, which prohibits retaliation against employees because of  
23 an employee’s or the Secretary’s complaint or investigation into violations of the Act.  
24 29 U.S.C. § 215(a)(3). Ahmed’s instructing his subordinates to provide false  
25 information to the Secretary and destroy documents violate the FLSA’s anti-retaliation  
26 provision by encouraging employees to “quietly . . . accept substandard conditions.” See  
27 Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1335 (2011)  
28 (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292, (1960)); see also  
Carrillo v. Schneider Logistics, Inc., No. CV 11–8557 CAS (DTBx), 2012 WL 556309,  
at \*6 (C.D. Cal. Jan. 31, 2012) (employer’s acts intended to chill protected conduct are  
retaliatory).

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Secretary respectfully requests that the Court grant  
3 the Secretary's Petition to enforce the administrative subpoenas and proposed TRO.  
4

5 Dated: March 4, 2015

Respectfully submitted,

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