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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Plaintiff, v. STANFORD YELLOW TAXI CAB, INC., a corporation; STANFORD MADELINE CAB, INC., a corporation; AAA LEGACY LIMOUSINE, INC., a corporation; and SAYED ABBAS, an individual; Defendants.	HON. EDWARD J. DAVILA Case No. 5:13-CV-04208 EJD **SECRETARY'S TRIAL BRIEF** Hearing Date: February 27, 2014 Time: 9:00 am Courtroom: 4

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A. Short Summary of Plaintiff's Case.

Thomas E. Perez, Secretary of Labor, United States Department of Labor ("Secretary") seeks to enjoin violations of the investigative and anti-retaliation provisions of the Fair Labor Standards Act of 1938 ("FLSA" or "Act"), 29 U.S.C. §§ 211(a) and 215(a)(3), by Defendants Stanford Yellow Taxi Cab, Inc., Stanford Madeline Cab, Inc., AAA Legacy Limousine, Inc. and Sayed Abbas ("Defendants"). At trial, the Secretary will demonstrate that Defendants have—through intimidation and retaliation—created a culture of fear to prevent employees from vindicating their rights under the FLSA. Defendants have interfered with the Secretary's lawful investigation of Defendants by exploiting this culture of fear and directing employees not to speak truthfully to the Secretary. Defendants have also misled their employees by telling these drivers that they are independent contractors and, therefore, not entitled to the statutory minimum wage and the protections guaranteed by the FLSA. The Secretary seeks the requested injunctive relief to insure that Defendants' employees are free to speak candidly with the Secretary, so that the Secretary can fully investigate and vindicate any violations of the FLSA by Defendants.

Congress enacted the FLSA to effectuate a broad public policy aimed at eliminating "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). To achieve this important purpose, the Secretary was granted broad investigatory powers under Section 11(a) of the Act, 29 U.S.C. § 211(a) as follows:

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

As the Supreme Court has recently re-affirmed, the ability of the Secretary to conduct investigations that are untainted by coercion and retaliation is crucial to the FLSA's enforcement regime. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011) (*quoting Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). The Supreme Court recognized the FLSA "relies for enforcement…, not upon 'continuing detailed federal supervision or inspection of payrolls,' but upon 'information and complaints received from employees seeking to vindicate rights claimed to have been denied.'" *Id.*

Here, the Secretary has attempted to investigate just such a complaint against Defendants for violations of the FLSA. Defendants' taxicab and limousine drivers generally work 12 hour shifts, six days per week, and often are not paid even the statutory minimum wage for all their hours. Defendants established these oppressive conditions by claiming, wrongly, that the drivers are "independent contractors," and, as a result, they are not required to pay them minimum wage and the drivers are not entitled to the protections of the FLSA.

On September 20, 2012, the Secretary, through the Wage and Hour Division, advised Defendants of the investigation, and sought Defendants' voluntary cooperation in producing certain records, and making drivers available for interviews with Wage and Hour investigators. Rather than comply with the Secretary's lawful requests, Defendants waged (and continue to wage) a campaign designed to intimidate drivers against cooperating with the investigators and coaching drivers to provide misinformation about the nature of the employment relationship between Defendants and drivers. Defendants have also sought to cover up their activities by instructing employees not to cooperate with the investigation, to contact counsel for the Defendants if approached by any Wage Hour Investigator ("WHI"), and to tell the Department of Labor only that they were independent contractors. The Defendants also required drivers to sign sham "lease agreements" that did not reflect the reality of the employment relationship and to back date these lease agreements to the beginning of such drivers' employment. Employees understood that their livelihood would be jeopardized if they cooperated with the Department's investigation. Defendants also refused to provide relevant documents subpoenaed by the Department, even after this

district court issued an order requiring the production of such documents. These tactics have interfered with and deterred the Secretary's investigation, thereby preventing the Secretary from obtaining the necessary information to vindicate the rights of Defendants' employees under the FLSA.

As with the investigatory authority provided by 11(a), the FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3)[1], is a critical element in the Act's enforcement scheme. *See e.g.*, *Robert DeMario Jewelry, Inc.*, 361 U.S. at 292. "The FLSA's anti-retaliation clause is designed to ensure that employees are not compelled to risk their jobs in order to assert their wage and hour rights under the Act." *Lambert v. Ackerly*, 180 F.3d 997, 1004 (9th Cir. 1999). Despite Defendants' intimidation and misinformation tactics, the Secretary was able to obtain sufficient information to establish that Defendants had retaliated against employees for engaging in protected activity under the FLSA. Wage and Hour learned during its investigation, and the evidence will show at trial, that Defendants required employees to work many hours for little or no pay. Employees who dared to complain about such uncompensated work were terminated—sending a strong message to other drivers that their livelihood would be taken away if they chose to exercise their rights under the FLSA.

To correct these significant violations, the Secretary seeks a permanent injunction that will require Defendants to cease its campaign of misinformation and coercion and allow the Secretary access to information necessary for the Secretary to complete his lawful investigation. Because of the culture of fear that Defendants have created to discourage employees from vindicating their rights under the FLSA, the Secretary submits that for relief to be effective, this Court should issue prospective injunctions:

- prohibiting Defendants from further violations of the Act;
- tolling the statute of limitations as of September 20, 2012, the date Wage and Hour initiated contact with Defendants;
- requiring Defendant Sayed Abbas to call a meeting of all drivers in which he clearly and unequivocally informs the drivers, in the presence of

[1] "It shall be unlawful for any person… to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the FLSA. 29 U.S.C. § 215(a)(3).

representatives from Wage and Hour, about the prospective injunction and informs them that (1) the drivers are employees, not independent contractors under the FLSA; (2) any leases issued by Defendants are not valid; (3) the drivers are permitted to talk to the Department of Labor investigators. At this meeting, representatives of Wage and Hour will also be permitted to explain the nature and purpose of its investigation and to request interviews outside the presence of Defendant Sayed Abbas;

- forbidding Defendants from destroying any records in their possession as to the hours worked or wages paid to the drivers, which records may assist Wage and Hour in completing the investigation and calculating any backwages due;
- requiring Defendants to produce all relevant documents and allow Wage and Hour to inspect the business premises;
- requiring Defendants to provide notice to the Secretary seven days before terminating its relationship with any driver to enable the Secretary to investigate if the termination is tainted by or related to retaliation because a driver exercised or attempted to exercise his rights;
- requiring Defendants to maintain time and payroll records required under 29 U.S.C. § 211(c) and implementing regulations found at 29 C.F.R. Part 516 for all employees, including drivers; and
- awarding Plaintiff his costs, pursuant to Federal Rule of Civil Procedure 54(d)(1).

B. Secretary's Contentions

I. Jurisdiction and venue are not contested and are established.

As evidenced by Defendants' Proposed Findings of Fact and Conclusions of Law, filed February 17, 2014, jurisdiction and venue are not contested by Defendants.

The Secretary brings this action on behalf of a federal entity seeking relief under 29 U.S.C. §§ 211(a) and 215(a)(3) of the FLSA, a federal law. As such, jurisdiction is established pursuant to 29 U.S.C. §§ 216, 217 (FLSA jurisdictional provision), by 28 U.S.C. § 1331 (federal question), and by 28 U.S.C. § 1345 (United States as plaintiff).

Defendants have stipulated that the businesses in question operate out of a

common address, 935 Sierra Vista Avenue, Mountain View, California 94043, which is within the District of this Court. As such, venue is proper pursuant to 28 U.S.C. § 1391(b).

II. The Secretary need not prove enterprise coverage.

Unlike the minimum wage and overtime provisions of the FLSA, neither Section 11(a) or Section 15(a)(3) specifically limit coverage to an "enterprise engaged in commerce or in the production of goods for commerce." *Compare* 29 U.S.C. §§ 211(a) and 215(a)(3) with 29 U.S.C. 206 §§ and 207. In light of the statutory language, courts have long held that Section 15(a)(3) does not require enterprise coverage. *See*, *e.g.*, *Wirtz v. Ross Packaging Co.*, 367 F. 2d 549, 550 (5th Cir. 1966) ("Unlike the wage and hour provisions of Sections 6 and 7 of the Act, which apply only to an 'employee * * * engaged in commerce or in the production of goods for commerce,' the protections of Section 15(a)(3) apply, without qualification, to 'any employee.' The prohibitions of Section 15(a)(3) are similarly unlimited, for they are directed to 'any person.'"); *Sapperstein v. Hager*, 188 F.3d 852, 856 (7th Cir. 1999) (holding same); *Dean v. Pacific Bellwether, LLC*, -- F.Supp.2d --, 2014 WL 539849 (D.N. Mar. I., Feb. 6, 2014) (holding the same and noting that three circuits and two district courts in other circuits have held that unlawful retaliation claims under the FLSA do not have a commerce requirement and only one district court has found to the contrary). As such, traditional "enterprise coverage" need not be established to enjoin Defendants actions in this matter.

III. The Defendants are subject to enterprise coverage under the FLSA.

Even if this Court were to find that "enterprise coverage" is required to grant relief under either 29 U.S.C. §§ 211(a) and 215(a)(3), the evidence and Defendants' stipulations establish such coverage.

Applicable Law

Enterprise coverage applies where (1) a single "enterprise," as defined in Section 3(r) of the Act, 29 U.S.C. § 203(r)(1), (2) "has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce by

any person," and (3) has not less than $500,000 annual gross volume of sales made or business done. 29 U.S.C. §§ 203(r)(1) and (s)(1)(A). Once enterprise coverage is established, all employees of the enterprise are covered by the FLSA's protections. *Maryland v. Wirtz*, 392 U.S. 183, 188 (1968), *overruled on other grounds by*, *Nat'l League of Cities v.*, 426 U.S. 833, 855, (1976) *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

Section 3(r) of the FLSA defines the term "enterprise" as "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units . . ." 29 U.S.C. § 203(r)(1). "If these three elements—related activities, unified operation or common control and common business purpose—are present, different organizational units are grouped together for the purpose of determining FLSA coverage." *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908, 915 (9th Cir. 2003).

In *A-One Medical*, the Ninth Circuit found that two distinct corporate entities formed one "enterprise" under Section 3(r). The court first found that the two entities conducted "related activities" because both provided home health services, despite the fact that the companies "service[d] different types of patients, under different level of care and eligibility requirements." *Id.* The court also found "common control" because one person had control over both entities. *Id.* Finally, the court found common business purpose, holding that this element will "generally [be] found where there are related activities and common control." *Id.* at 916.

Evidence Defendants Form a Single Enterprise

The evidence at trial will establish that Defendants Stanford Yellow Taxi Cab, Inc., Stanford Madeline Cab, Inc., and AAA Legacy Limousine, Inc. ("Corporate Defendants") are each in the business of providing passenger transportation services (limousine or taxicab). They share a single facility, use common resources, exchange employees and promote each other's services. Defendants have admitted and stipulated that Sayed Abbas is and has been the only owner and President of the Defendants Stanford Yellow Taxi Cab, Inc., Stanford Madeline Cab, Inc., and AAA Legacy

Limousine, Inc. ("Corporate Defendants") and is the only supervisor, officer, or executive of Defendants Stanford Yellow Taxi Cab, Inc., and AAA Legacy Limousine, Inc.

Evidence Defendants Have One or More Employees that Handle Goods that Have Moved in Commerce

Defendants have admitted that they have dispatchers that use telephones and other equipment that have moved in or been produced in commerce. The evidence will show that Defendants also employ drivers, who operate automobiles that have moved in commerce.

Evidence of Annual Gross Dollar Volume

Defendants have admitted in discovery and subsequently stipulated that the combined annual gross dollar volume of the Corporate Defendants collectively exceeded $500,000 in calendar years 2011 through 2013.

IV. Drivers for the Defendants are "employees" under the FLSA.

Section 15(a)(3) of the FLSA forbids retaliation against any "employee" for engaging in protected activity. 29 U.S.C. § 215(a)(3). The Secretary contends that the drivers for Defendants who suffered retaliation were "employees" as a matter of law, and thus are clearly subject to the protection of 29 U.S.C. § 215(a)(3).[2]

Applicable Law

As the Ninth Circuit has explained, "Courts have adopted an expansive interpretation of the definitions of 'employer' and 'employee' under the FLSA, in order to effectuate the broad remedial purposes of the Act. The common law concepts of 'employee' and 'independent contractor' are not conclusive determinants of the FLSA's coverage." *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (*internal citations and footnotes omitted*). Under the FLSA, "employees are those who *as a matter of economic reality* are dependent upon the business to which they render service." *Id.* (*emphasis in original*). Factors that should be considered in distinguishing employees from independent contractors include, but are not limited to:

[2] The Secretary does not opine here whether Section 15(a)(3) could protect independent contractors. Because the evidence will demonstrate that the drivers were in fact employees, the Court need not address that issue.

1) the degree of the alleged employer's right to control the manner in which the work is to be performed;

2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;

3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;

4) whether the service rendered requires a special skill;

5) the degree of permanence of the working relationship; and

6) whether the service rendered is an integral part of the alleged employer's business.

Id. "The evaluation of the relationship as a whole, however, depends not on isolated factors but 'upon the circumstances of the whole activity.'" *Hale v. State of Ariz.*, 967 F.2d 1356, 1364 (9th Cir. 1992) (quoting *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730 (1947)).

Evidence

The Secretary will present evidence establishing that Defendants' drivers are employees for purposes of the FLSA. The evidence will show that Defendants exercise significant control over drivers. Defendants control when shifts start and stop, what days drivers work, where drivers are required to wait for business, what drivers must wear, and which fares drivers must accept. Drivers are tracked by GPS and must seek permission before going any place for personal reasons. Although most drivers work 12-hours per day, six days a week, drivers are sometimes required to extend shifts to ensure there is coverage for Defendants' business needs.

The evidence will also show that a drivers' opportunity for profit or loss has little to no relationship to their managerial skill. Where fares are negotiated and not subject to municipally-set rates, Defendants negotiate the rate without input from drivers. Drivers are also required to follow Defendants' credit card payment procedures. Drivers are forbidden from providing passengers their personal contact information and are required to sign a "non-compete" agreement prohibiting work for other passenger transportation companies while employed by

Defendants.

The evidence will also show that Drivers make no upfront investment in equipment or materials other than a $200 deposit which is refunded at the termination of the employment relationship if there is no damage to vehicles. Drivers are not allowed to take their so-called "leased" vehicles home with them after their shift, and they are not required to make any "lease" payments.[3] The evidence will also establish that Defendants require no specialized skills – only the ability to drive. In addition, the evidence will show that drivers work on average at least 72 hours per week and many drivers work for Defendants for months or years. The drivers' long hours and low pay, as well as the prohibition against driving for other companies, renders the drivers economically dependent on Defendants. Finally, the evidence will show that the service rendered by the drivers for Defendants is not only integral to the business of Defendants, but it is the primary source of revenue for Defendants.

V. Defendant Sayed Abbas is an "Employer" under the FLSA.

The evidence establishes that Sayed Abbas is an "employer" under Section 3(d) of the FLSA, which provides that an "employer" for purposes of the Act "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). As noted above, Defendants have stipulated that Sayed Abbas is the only supervisor, officer, or executive of Defendants Stanford Yellow Taxi Cab, Inc., and AAA Legacy Limousine, Inc. The evidence will also show that Sayed Abbas has sole authority to hire and fire employees of Defendants Stanford Yellow Taxi Cab, Inc., Stanford Madeline Cab, Inc., and AAA Legacy Limousine, Inc. As such, Defendant Abbas is a 3(d) employer for purposes of the Act.

VI. Defendants interfered with the Department of Labor's investigation in violation of Section 11(a) of the FLSA.

The Secretary will establish that Defendants have willfully violated Section 11(a) of the FLSA, 29 U.S.C. § 211(a).

[3] The "sham" lease agreements used by Defendants are also not probative of whether the drivers are independent contractors or employees. *See Real*, 603 F.2d at 754 ("Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA.")

Applicable Law

Section 11 of the FLSA empowers the Secretary to:

> investigate…the wages, hours,…and practices of employment[,]…enter and inspect such places[,]…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 [the FLSA]… the [Secretary] shall bring all actions under section 217 of this title to restrain violations of this chapter.

29 U.S.C. § 211(a). The FLSA grants the Secretary these investigatory powers because the statute "relies for enforcement…, not upon 'continuing detailed federal supervision or inspection of payrolls,' but upon 'information and complaints received from employees seeking to vindicate rights claimed to have been denied.'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011) (*quoting Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

Evidence

The Secretary will show that Defendants have obstructed and interfered with the Secretary's investigation. Examples of such obstruction and interference include Defendants: instructing drivers not to cooperate with the Department of Labor; repeatedly "reminding" drivers that they are independent contractors and not employees; encouraging drivers to provide the Department of Labor misinformation; telling drivers to tell anyone with the Department of Labor to contact Defendants' counsel rather than speaking truthfully to the Secretary; requiring drivers to sign sham "lease agreements" after the start of the Secretary's investigation and back dating the lease agreement to the beginning of the drivers employment; destroying employment records of drivers, including hours worked and amounts paid; and refusing to produce documents and information relevant to the investigation, even after Ordered by this district court to do so. The evidence will show that these actions interfered with and inhibited Wage and Hours investigation.

VII. Defendants retaliated against employees in violation of Section 15(a)(3) of the Act.

The Secretary will put on evidence at trial demonstrating that Defendants willfully engaged in retaliation in violation of Section 15(a)(3) of the Act.

Applicable Law

Under Section 15(a)(3) of the FLSA, it is:

> unlawful for any person…to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under [the FLSA], or has testified or is about to testify in any such proceeding…

29 U.S.C. § 215(a)(3).

This provision "is designed to ensure that employees are not compelled to risk their jobs in order to assert their wage and hour rights under the Act." *Lambert v. Ackerly*, 180 F.3d 997, 1004 (9th Cir. 1999). Accordingly, this anti-retaliation provision must be interpreted liberally to "give effect to the statute's remedial purpose." *In re Majewski*, 310 F.3d 653, 655 (9th Cir. 2002). Threats of retaliation, like those made by Defendants, are as much a basis for injunctive relief as past retaliatory acts. *See United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952) ("All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to occur").

In order for a plaintiff to establish a prima facie case of retaliation under the FLSA, he must show that: "(1) he or she engaged in activity protected by the FLSA; (2) he or she suffered adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) a causal connection existed between the employee's activity and the employer's adverse action." *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997) (analyzing an FLSA retaliation claim by adopting the Title VII burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)); *see also Stewart v. Masters Builders Ass'n of King & Snohomish Counties*, 736 F. Supp. 2d 1291, 1295 (W.D. Wash. 2010) (*citing Conner* and using same burden-shifting analysis for FLSA retaliation claim).

As to the first element to establish retaliation—engaging in a protected activity—the Supreme Court has instructed that the term "complaint" should be broadly construed to effectuate the important remedial purposes and weighty public interest underlying the

Act. *Kasten*, 131 S. Ct. at 1334. The "enforcement needs" of the FLSA "argue for an interpretation of the word 'complaint' that would provide 'broad rather than narrow protection to the employee.'" *Id.* at 1333 (*citations omitted*). As observed by the First Circuit in *Valerio v. Putnam Associates, Inc.*, 173 F.3d 35 (1st Cir. 1999), when analyzing what is a "complaint" under the FLSA's anti-retaliation provision:

> By failing to specify that the filing of any complaint need be with a court or an agency, and by using the word "any," Congress left open the possibility that it intended "complaint" to relate to less formal expressions of protest, censure, resentment, or injustice conveyed to an employer.

Id. at 41; *see also Wilke v. Salamone,* 404 F. Supp. 2d 1040, 1048 (N.D. Ill. 2005) (holding that "refusal to work for free" is protected activity because it is a form of asserting the employee's statutory right "to be paid for his work, as is required under the FLSA").

Regarding the second element to show retaliation under the FLSA—an adverse employment action—the Ninth Circuit has defined an adverse employment action broadly to mean any employment decision "reasonably likely to deter employees from engaging in protected activity." *Ray v. Henderson*, 217 F. 3d 1234, 1243 (9th Cir. 2000) (the Ninth Circuit takes "an expansive view of the type of actions that can be considered adverse employment actions").

For the final element—a causal link between the protected activity and the adverse action—a party claiming retaliation under the FLSA must "proffer evidence from which a reasonable factfinder could infer that the employer retaliated against him for engaging in the protected activity." *Blackie v. State of Me.*, 75 F.3d 716, 723 (1st Cir. 1996). The "causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Schnuck Markets, Inc*., 121 F.3d at 1395 (*citations omitted*).

Evidence

The evidence will establish that Defendants required their drivers to work very long hours, sometimes for no pay at all. At least two drivers who complained about and refused to work for little or no wages were fired as a result. The evidence will further show that other drivers understood that they would be terminated if they protested or

refused to work for no pay. The evidence will also show that at least one driver was terminated in retaliation for cooperating with the Secretary of Labor and for being placed on the witness list in these proceedings.

C. Relief sought by the Secretary.

I. Section 17 of the FLSA authorizes broad injunctive relief.

Section 17 of the FLSA specifically authorizes the Court to restrain violations arising under Section 15 of the Act., 29 U.S.C. § 217. Similarly, Section 11(a) specifically instructs the Secretary of Labor to "bring all actions under section 217 of this title to restrain violations of this chapter [Section 11]." As such, this Court has clear and unambiguous authority under Section 17 to restrain the violations of Sections 11(a) and Sections 15(a)(3) of the Act.

Only the Secretary of Labor may file an action under 29 U.S.C. § 217. *See, e.g.*, *Barrentine v. Arkansas-Best Freight System, Inc*., 750 F.2d 47, 51(8th Cir. 1984); *Roberg v. Henry Phipps Estate*, 156 F.2d 958 (2d Cir. 1946). Where a violation of the Act is found, the Ninth Circuit has interpreted Section 17 to substantially limit a district court's discretion to not enjoin prospective injunctions affording relief or issue restitutionary injunctions where appropriate. *See Marshall v. Chala Enterprises, Inc.*, 645 F.2d 799, 804 (9th Cir. 1981) (holding that district court abused its discretion where it declined to issue a restitutionary injunction under Section 17).

The Supreme Court has made clear that district courts have broad leeway in fashioning equitable remedies under Section 17. Specifically, "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Robert DeMario Jewelry, Inc.*, 361 U.S. at 291 (citations omitted). In *Robert DeMario Jewelery*, the Court considered whether Section 17 authorized a restitutionary injunction for back wages for claims of retaliation under Section 15(a)(3). Although Section 17 does not explicitly authorize such an award under Section 15(a)(3), the Court found that such back pay was an appropriate remedy in light of the purpose of the Act. The Court reasoned: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide *complete relief in light of the*

statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to * * * give effect to the policy of the legislature.'" *Robert DeMario Jewelry, Inc.*, 361 U.S. at 291-292 (*emphasis added*); *see also Bailey v. Gulf Coast Transp., Inc.*, 280 F.3d 1333, 1337 (11th Cir. 2002) (following *Robert Demario Jewelry* to award back pay as an equitable remedy for violating 15(a)(3) of the Act).

II. The Secretary's Requested Relief is Necessary and Appropriate to Provide Complete Relief in Light of the Statutory Purposes.

By willfully interfering with the Secretary's lawful investigation in violation of Section 11(a) and by terminating employees that have asserted their rights under Section 15(a)(3) of the Act, drivers for the Defendants will likely remain fearful about cooperating with the Department of Labor and reluctant to assert their rights even if this Court determines there were past violation and simply enjoins future violations. The Defendants' years of coercion, misrepresentation of employee status, and interference with the Secretary's investigation require strong measures to allay the fear of these employees. As such, to remedy the Defendants violations and "provide complete relief in light of the statutory purposes," the Secretary seeks an Order as follows:

a) Prospective Injunction

The Secretary requests that this Court issue a prospective injunction restraining Defendants, their officers, agents, servants, employees, and all persons acting in their behalf and interest from violating the provisions of FLSA §§ 11(a) and 15(a)(3), 29 U.S.C. §§ 211(a) and 215(a)(3), by, *inter alia*: instructing any individual not to speak to representatives of the Secretary; obstructing the Secretary's investigation in any way; or retaliating or threatening to retaliate against any driver or any employee for reporting or complaining about any violations of the FLSA.

As the Ninth Circuit has observed, such an injunction "subjects the defendants to no penalty, to no hardship. It requires the defendants to do what the Act requires anyway to comply with the law." *Chala Enterprises, Inc.*, 645 F.2d at 804 (internal quotation and citation omitted). In this light, the Ninth Circuit has held that "the manifest difficulty of the Government's inspecting, investigating, and litigating every complaint of a violation weighs heavily in favor of enforcement by injunction after the court has found an unquestionable violation of the Act." *Id.* (internal quotation and

citation omitted).

b) Tolling of the Statute of Limitations

The Secretary requests that this Court issue a prospective injunction tolling the running of the statute of limitations for asserting any claim against Defendants under the FLSA as of September 20, 2012, the date the Secretary first made contact with Defendants.

The Ninth Circuit has made clear that equitable tolling is appropriate when, as here, "the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time." *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999); *see also Adedapoidle-Tyehimba v. Crunch, LLC*, 2013 WL 5594713, 2 (N.D.Cal. 2013) (granting equitable tolling in FLSA case based on "extraordinary circumstances"). The Secretary intends to amend its complaint when the investigation is completed to seek the unpaid wages due to Defendants' employees. Thus, if this remedy is not provided, the Defendants stand to be unjustly enriched by the eroding of the statute of limitation for recovery of any back wages due by the delay achieved by their unlawful interference and retaliation have caused the Secretary in completing his investigation.

c) Mandatory Statement to Employees and Access to Wage and Hour

The Secretary requests that this Court issue a prospective injunction requiring Defendant Sayed Abbas, within ten days of this Order, to call a meeting of all drivers of Stanford Yellow Taxi Cab, Inc. and AAA Legacy Limousine, Inc. with the meeting to be attended by one or more Wage and Hour Investigator(s). At that meeting, Sayed Abbas shall announce to all drivers that (a) the drivers are employees, not independent contractors, for the purpose of the FLSA; (b) the leases issued by Sayed Abbas are not effective; (c) the drivers may talk to Wage and Hour without any fear of retaliation, and (d) he has been enjoined by the Court from interfering and retaliating against drivers for cooperating in the investigation. After making this statement, Mr. Abbas shall leave the premises and allow Wage and Hour to interview any employee that is willing to speak to the Investigator(s). All drivers shall be paid in accordance with the FLSA for the time spent attending this meeting.

Defendants have prevented drivers from vindicating their rights under the FLSA by directing the drivers not to talk to the Secretary, and by misleading their drivers that they are independent contractors who are not protected by the FLSA. The remedy sought by the Secretary is critical to ensuring that the statutory purposes of Sections 11(a) and 15(a)(3)—that the Secretary be able to obtain information from employee witnesses who have no fear of employer coercion or retaliation—are vindicated. This remedy is also consistent with injunctions issued by other courts within this Circuit to enjoin retaliatory behavior under the FLSA. *See Harris v. Oak Grove Cinemas, Inc.*, 2013 WL 3456563, 2 (D.Or. 2013) (issuing a temporary restraining order under Section 17 of the FLSA that required Defendant or a designee of the Secretary to "read aloud … to all employees" a lengthy statement "informing them of their right to speak, free from retaliation or threats of retaliation or intimidation by [d]efendant [], with representatives of the Acting Secretary including but not limited to officials of the Wage and Hour Division regarding the instant investigation, litigation arising out of the investigation, or any work conditions," and providing that the statement was "to be read during employees' paid working hours"); *Perez v. Alkanan, Inc.,* Temporary Restraining Order, Case 2:13-cv-09228-GAF-JEM, Docket No. 7 (C.D. Cal. 2013) (issuing temporary restraining order under Section 17 of the FLSA restraining violations of Section 11(a) and 15(a)(3) by requiring statement to be read aloud to "all employees" during "paid working hours").

d) Order Requiring Defendants Not to Destroy Employment Records

The Secretary requests that this Court issue a prospective injunction prohibiting Defendants from destroying any record showing the hours worked by drivers, or amounts paid to drivers. Defendants have admitted to destroying employment records under the cover that the records relate to drivers who are not employees. As noted above, the evidence at trial will demonstrate that drivers are, in fact, employees, and as such, the destruction of employment records impedes and interferes with the Secretary's investigation.

e) Access to Employment Records

The Secretary requests that this Court issue a prospective injunction which, within three days of the order, will require Defendants to provide Wage and Hour

access to all records of hours worked by drivers, amounts paid to drivers, and tax statements given to drivers, including 1099 records. If any such records are in the possession of third parties, Defendants shall provide the Secretary the contact information for these third parties and shall instruct such third parties that Defendants authorize release of such records to representatives for the Secretary.

This order is necessary because of Defendants' stalwart refusal to provide the Secretary open access to relevant documents, as demonstrated by Defendants failure to comply with a subpoena enforcement order issued by this Court. This Order requires the Defendant to do no more than comply with their obligations to provide the Secretary with access to relevant documents pursuant to Section 11(a) of the FLSA. *See Chala Enterprises, Inc.*, 645 F.2d at 804.

f) Requirement to Maintain Employment Records

The Secretary requests that this Court issue a prospective injunction ordering that Defendants to maintain the time and payroll records required under 29 U.S.C. § 211(c) and implementing regulations found at 29 C.F.R. Part 516 for all employees.

This order is necessary because Defendants have admitted to destroying documents under the cover that drivers are independent contractors. Because they are not independent contractors, as the evidence will show, the failure to maintain employment records in accordance with 29 U.S.C. § 211(c) interferes with the Secretary's ability to conduct his investigation. This order merely requires Defendants to comply with laws they are already obligated to comply with. *See Chala Enterprises, Inc.*, 645 F.2d at 804.

g) Notice to the Secretary Before Terminating Employees

The Secretary requests that this Court issue a prospective injunction ordering Defendants to provide notice to the Secretary seven days before terminating its relationship with any driver to enable the Secretary to investigate if the termination is tainted by or related to retaliation because a driver exercised or attempted to exercise his rights under the FLSA.

This is necessary to ensure Defendants do not continue to retaliate against any employee that cooperates with the Secretary or engages in any other form of protected activity. *See Perez v. Alkanan, Inc.,* Preliminary Injunction, Case 2:13-cv-09228-GAF-

JEM, Docket No. 12 (C.D. Cal., December 27, 2013).

h) Order Requiring Defendants to Pay Fees and Costs

The Secretary requests that Defendants pay costs pursuant to Fed. R. Civ. P. 54(d)(1).

D. Anticipated Evidentiary Issues

On February 14, 2014, the Secretary filed a motion in limine to exclude defendants from introducing documents and putting on witnesses that defendants did not disclose notwithstanding a subpoena enforcement order issued by this district court. Defendants filed an opposition on February 18, 2014.

On February 14, 2014, Defendants filed two motions in limine, the first seeking to exclude witnesses that signed John Doe Declarations in support of the Secretary's preliminary injunction motion and the second to strike certain undisputed facts from the Final Joint Pretrial Conference Statement also filed on February 14, 2014. The Secretary filed his oppositions to these motions on February 18, 2014.

In addition to the above-references motions, the Secretary may need to file further motions to limit and exclude evidence at trial due to Defendants failure to provide the Secretary with critical information about their trial plans as required by this Court's Standing Order Re: Preliminary and Final Pretrial Conferences and Trial Preparation in Civil Cases ("Standing Order"). For example, Section I.2.B of the Standing Order required the parties to include in their Exhibit Lists a "[b]rief statement for each [exhibit] describing its substance or purpose and the identity of the sponsoring witness." Defendants have not done so. As such, the Secretary remains completely in the dark as to the purpose to the Exhibits provided by the Defendants and who the sponsoring witness will be for those Exhibits.

Similarly, Section I.2.B of the Standing Order requires the Defendants to provide "[a] list of witnesses likely to be called at trial, other th[a]n solely for impeachment or rebuttal, together with a brief statement following each name describing the substance of the testimony to be given." Defendants have not provided the Secretary with a brief statement describing the substance of the testimony to be given for each of its witnesses. As such, the Secretary does not know the purpose of each witness and

cannot plan accordingly.

Also in violation of Section I.2.B. of the Standing Order, Defendants have failed to identify what their defense will be at trial.

Finally, the Secretary has recently obtained information that puts into question the authenticity of the declarations submitted to this Court by Defendants at the preliminary injunction phase, and which Defendants have placed on their Exhibit lists. The Secretary has requested to inspect the original declarations pursuant to Local Rule 5-1(i)(3), but Defendants have so far refused to allow such inspection. Should Defendants refuse to allow such inspections to go forward before trial, the Secretary reserves the right to move the Court at trial for an order under Rule 5-1(i)(3) requiring Defendants to disclose the original declarations or be prohibited from referring to the declarations in any way at trial and be prohibited from putting any such declarants on the stand.

E. Additional Filings and the Need for a Prompt Trial

Counsel for Defendants, Eric Hartman, filed a "Notice" on February 19, 2014, stating that he is now unavailable for the trial of this matter. Earlier today (February 20, 2014), the Secretary responded to the notice stating that the need to proceed promptly with the trial is significant as the witness list and exhibits have been exchanged and employees are now particularly vulnerable to retaliation.

This afternoon, the Secretary learned that Anthony Pelayo, one of the few current employees on the witness list, was terminated from his job with Mr. Abbas after four years of employment. The stated reasons for the termination appear pretextual and the Secretary will prove at trial that the termination was retaliatory. Mr. Pelayo has two young children and it is imperative that Mr. Pelayo be promptly reinstated to protect this worker and to avoid any further chilling effect on other employees. The Secretary reserves the right to file any additional motions or amended documents to ensure that this reinstatement is expeditiously accomplished.

Respectfully submitted,

Dated: February 20, 2014

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