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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THOMAS E. PEREZ,
Plaintiff,

v.

SEAFOOD PEDDLER OF SAN RAFAEL,
INC., et al.,
Defendants.

Case No. [12-cv-00116-WHO](#)

**ORDER DENYING DEFENDANTS’
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MOTIONS *IN
LIMINE***

Re: Dkt. Nos. 233, 234, 235, 236, 306, 349

This is a case where almost every material fact is in dispute and yet the defendants filed a motion for partial summary judgment. Plaintiff Thomas E. Perez, Secretary of the United States Department of Labor, alleges that defendants Seafood Peddler of San Rafael, Inc., Richard Mayfield, Alphonse Silvestri, and Fidel Chacon failed to pay their kitchen employees overtime compensation; failed to make and maintain complete and accurate wage and hour records; and retaliated against employees for cooperating with the Secretary during his investigation of those alleged violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* The defendants deny the Secretary’s allegations.

The defendants filed a motion *in limine* to exclude the testimony of eight of their former employees, testimony that the defendants admit contradicts their defenses, on the ground that the employees asserted their Fifth Amendment privilege against self-incrimination in response to subpoenas for and deposition questions about their income tax returns. If that motion is granted, the defendants reason, there will be no evidence to support the Secretary’s theory of the case with respect to the eight employees.¹ Thus, the defendants seek partial summary judgment on the

¹ Those employees are Hector Hernandez, Sergio Mejia, Alejandro Perez, Luis Sandoval, Esau Santos, Juan Tizol, Noel Viera, and Victor Viera.

1 claims related to those employees.

2 The subpoenas and questions that drew the assertion of the Fifth Amendment privilege
3 seek information that is tangential to the causes of action at issue and, for that reason, I will not
4 exclude the testimony of the employees. Their testimony raises substantial issues of material fact
5 that a jury must resolve. I heard argument on June 18, 2014, and now DENY both motions.²

6 **FACTUAL BACKGROUND**

7 In reciting the contested factual background below, I include facts drawn from the
8 testimony of the eight employees that are relevant to both motions. Following this section, I turn
9 to the motions *in limine* and discuss the subpoenas and questions that led the employees to invoke
10 their Fifth Amendment rights. I then conclude with a discussion of the related summary judgment
11 motion.

12 Seafood Peddler was a restaurant that could seat approximately 350 people in its main
13 dining area and approximately 215 people at an adjacent banquet room. Mayfield Tr. 23:9-24:21.
14 It was open every day of the year except Christmas, from 11:30 a.m. until 9:30 p.m. on Sunday

15
16 ² On May 30, 2014, the defendants moved for leave to file three-days late documents in support of
17 their reply brief to their motions *in limine*, which was due on May 27, 2014. Dkt. No. 306. There
18 is little justification for granting this motion. The defendants could have filed their request before
or on the date their reply brief was due, or sought a stipulation for an extension with the Secretary,
but they did not do so.

19 The defendants knew since April 21, 2014, when they filed their motions that their reply would be
20 due May 12, 2014. Based on a request from the Secretary, I granted an extension for the reply
21 brief to May 19, 2014. Dkt. No. 272. Based on the parties' stipulation, I granted another
extension for the reply brief to May 27, 2014. Dkt. No. 286. Yet they still failed to meet the
deadline.

22 None of the "reasons for the late filings" offered by defense counsel—such as that his printer
23 broke or that his "hand-held dictating machine" "gave out"—excuse his failure to comply with
24 court deadlines. Nor does it matter that he is "a solo practitioner with two associates," one of
whom "was unable to work each weekend, and the three-day Memorial Day holiday weekend as
well."

25 This case has been mired by too many distractions throughout its course. In the interest of
26 reaching the merits of this case, I will allow the late-filed materials to be considered and the
motion is GRANTED.

27 On May 30, 2014, under Civil Local Rule 7-3(d)(1), the Secretary filed objections to reply
28 evidence submitted by the defendants. Dkt. No. 305. On June 5, 2014, the defendants moved for
leave to file a response to the Secretary's objections. Dkt. No. 349. The motion is DENIED. I
will only consider admissible evidence and appropriate argument.

1 through Thursday, and 11:30 a.m. until 10:30 p.m. on Friday and Saturday. Chacon Tr. 44:7-22;
2 Mayfield Tr. 47:8-20; Def. Admis. No. 59. Employees started working as early as 10:00 a.m. and
3 worked until about 10:00 p.m. Chacon Tr. 60:13-22. The kitchen, which was 4000 square feet,
4 had six stations: a sauté station, a fryer, a grill, a pantry for dessert and salad making, a prep area,
5 and a dishwashing area. 30(b)(6) Tr. 48:1; Chacon Tr. 55:21-56:22; Mayfield Tr. 33:5-34:16,
6 101:2-21, 103:3-8. On a typical Friday or Saturday evening, the restaurant would have one or two
7 employees at each food preparation station, an employee who worked as a prep cook, and one to
8 three employees to wash dishes. Mayfield Tr. 101:2-21; Viera Decl. ¶ 6.

9 According to the employees, kitchen employees consistently worked over 40 hours per
10 week, averaging 61 weekly hours. Santos Tr. at 63:1-15; Hernandez Tr. 43:3-16, 80:23-81:19;
11 Noel Viera Tr. 62:12-63:5; Meija Tr. 37:25-38:8, 39:23-40:7; Viera Decl. ¶ 3; Castillo Decl. ¶ 4;
12 Eastwood Decl. ¶¶ 4-5. Kitchen employees have testified that head chef Chacon set their work
13 schedules and posted in the kitchen a written weekly schedule listing their hours. Sandoval Tr.
14 36:14-38:5, 157:19-158:8; Noel Viera Tr. 144:4-147:6, 172:6-173:4, 176:19-179:1; Viera Decl.
15 ¶ 5. A photograph of one of these schedules taken by a kitchen employee shows that employees
16 were often scheduled for more than 40 hours of work per week. Viera Decl. Ex. B. The
17 defendants deny these facts.

18 Certain employees testified that during their employment, Seafood Peddler kept timecards
19 which accurately reflected their hours worked, but that these accurate timecards were not the
20 timecards the defendants produced in this litigation and showed to the employees during their
21 depositions. Perez Tr. 31:12-32:18, 56:10-60:21; Santos Tr. 105:20-106:25; Tizol Tr. 43:8-45:11,
22 46:10-15, 48:15-17; Meija Tr. 26:8-30:5, 32:2-36:3; Hernandez Tr. 217:11-219:3; Sandoval Tr.
23 33:13-34:7, 34:23-36:13; Noel Viera Tr. 69:1-74:6, 76:5-81:5. At least three employees kept their
24 own written records of the hours they worked. Santos Tr. 100:12-102:1; Hernandez Tr. 27:18-
25 28:11; Sandoval Tr. 46:17-25.

26 Seafood Peddler paid kitchen employees every two weeks. Santos Tr. 69:12-15. Every
27 pay day, each kitchen employee received an envelope containing his pay in either a combination
28 of cash and check or all cash. Perez Tr. 61:3-16; Santos Tr. 104:11-20, 70:23-25, 78:20-80:6,

1 102:18-103:18, 108:20-110:5; Hernandez Tr. at 26:3-27:17; Tizol Tr. 52:22-55:13; Sandoval Tr.
2 32:14-33:5, 45:16-46:1, 46:17-21; Viera Decl. ¶ 3. The pay generally covered all of the
3 employees' hours, but the restaurant paid all hours worked at a flat rate. Viera Decl. ¶¶ 3-4;
4 Castillo Decl. ¶ 4; Paxtor Decl. ¶ 4; Eastwood Decl. ¶¶ 2-4; Santos Tr. 162:10-163:1; Hernandez
5 Tr. 238:20-239:5, 250:24-251:9; Sandoval Tr. 22:1-23:1, 26:21-27:2, 30:24-31:7, 42:20-24; Meija
6 Tr. 36:4-37:7, 64:5-66:19. Employees testified that Seafood Peddler never paid kitchen
7 employees an overtime premium for work that exceeded 40 hours in a week. *See, e.g.*, Santos Tr.
8 63:1-15, 162:10-163:1; Sandoval Tr. at 42:20-24. Seafood Peddler's records reflect that it did not
9 pay its employees an overtime premium, and the defendants deny the employees' claims. *See*
10 Silvestri Decl. (Dkt. No. 242) ¶ 23; Eastwood Decl. ¶ 8.

11 While employers are required by federal law to maintain records of the wages and hours
12 worked by certain employees, Seafood Peddler's records are incomplete and missing. 29 U.S.C.
13 § 211(c); 29 C.F.R. § 516.2; Def. Admis. No. 45; 30(b)(6) Tr. 66:12-15, 85:15-86:7; Silvestri
14 Decl. (Dkt. No. 242), ¶ 14; Darling Decl. ¶ 4. For the three years at issue in this case, Seafood
15 Peddler produced records for eight months only. Darling Decl. ¶ 4. Many of these timecards are
16 undated, and Seafood Peddler does not know what the actual dates for the timecards are. 30(b)(6)
17 Tr. 141:1-143:12, 145:17-24, 147:10-23, 158:7-159:21; Silvestri Tr. 20:13-15, 26:16-22. The
18 restaurant admits that the remaining time records are lost. Silvestri Decl. (Dkt. No. 242) ¶ 14;
19 Def. Admis. No. 45.

20 Noel Viera, who Seafood Peddler placed in charge of filling out kitchen employees'
21 timecards when Chacon was not present, testified that the time cards with his name that the
22 defendants produced were fabrications because, in addition to not reflecting the hours he actually
23 worked, they were written by somebody else. Noel Viera Tr. 69:1-74:6, 76:5-81:5; Def. Admis.
24 No. 46. Viera had the authority to fill out and initial his own timecards when Chacon was not
25 present to do it for him. Noel Viera Tr. 69:1-74:6, 76:5-81:5; Silvestri Decl. (Dkt. No. 242) ¶ 13;
26 Def. Admis. No. 46.

27 While Seafood Peddler did not keep contemporaneous records of employees' daily or
28 weekly work hours, the defendants claim that general manager Mayfield tallied employees' hours

1 worked from their two weekly timecards for each pay period and wrote their total hours on
2 certification sheets. 30(b)(6) Tr. 61:20-62:4; Mayfield Tr. 78:23-81:8, 83:11-84:3, 86:25-87:14,
3 119:20-120:6. Seafood Peddler claims that it then gave checks to employees and created its
4 payroll register based on the hours listed on those certifications. 30(b)(6) Tr. 61:20-63:3, 67:7-18,
5 91:17-92:24.

6 Employees testified that the certifications, like the timecards, did not accurately reflect the
7 hours they worked each pay period: the hours listed only represent the hours for which Seafood
8 Peddler paid by check each pay period, which was a fraction of the hours they actually worked.
9 Santos Tr. 72:5-76:2; Hernandez Tr. 239:2-5; Noel Viera Tr. 59:6-63:5; Meija Tr. 77:5-80:5.
10 Employees also testified that when they received their pay, they did not sign anything. Santos Tr.
11 72:5-76:2; Hernandez Tr. 28:21-29:3; Sandoval Tr. 26:12-14, 153:7-154:4; Meija Tr. 30:7-32:1.
12 Several employees testified that at some point during their employment at Seafood Peddler,
13 Chacon instructed them to sign stacks of papers which were written in English even though the
14 employees (who are generally Spanish speakers) did not fully understand them; the employees
15 signed the documents nonetheless. Santos Tr. 85:21-88:22; Sandoval Tr. 24:20-26:8, 26:21-27:2,
16 153:7-155:5; Noel Viera Tr. 16:9-28:25; Meija Tr. 67:16-71:4. One employee testified that
17 Chacon told him and his kitchen co-workers to sign these papers shortly before Seafood Peddler
18 closed in January 2012, which was after the Secretary began his investigation of Seafood
19 Peddler's alleged violations. Noel Viera Tr. 16:20-27:24.

20 Employees also testified that Seafood Peddler's pay records—the actual paychecks and
21 payroll registers listing the check amounts—only reflected the amounts they were paid in check
22 each pay period, not the true amount of their pay. Hernandez Tr. 247:18-248:17; Noel Viera Tr.
23 33:7-16, 34:1-36:2; Perez Tr. 54:2-13; Santos Tr. 71:4-19, 73:16-76:2; Meija Tr. 36:4-37:7. They
24 testified that they received large portions of their pay in cash. Hernandez Tr. 247:18-248:17; Noel
25 Viera Tr. 33:7-16, 34:1-36:2; Perez Tr. 54:2-13; Santos Tr. 71:4-19, 73:16-76:2; Meija Tr. 36:4-
26 37:7. Neither the payroll nor the checks themselves reflect any cash payments to kitchen
27 employees and the defendants deny that Seafood Peddler ever made any such payments. 30(b)(6)
28 Tr. 75:25-76:5; Eastwood Decl. ¶ 8.

1 cash payments were made.

2 The defendants then argue that if the testimony of the deponents is excluded, a document
3 the defendants call the “Eastwood Report,” that allegedly “reflects no direct evidence other than
4 statements made by the eight Deponent witnesses that the Employer paid these Employees their
5 wages in cash,” should be excluded as well. MIL Br. 20.

6 The Secretary argues that exclusion and any adverse inference are permitted only with
7 respect to the specific subject matter of the question the party refused to answer and only where
8 there is independent evidence of the fact asked to be inferred: here, any adverse inference would
9 relate only to whether the deponents filed income taxes, not whether they received cash wages.
10 MIL Opp’n (Dkt. No. 284) 2.

11 **II. LEGAL STANDARD**

12 “[T]he Fifth Amendment’s protections against self-incrimination can be asserted in any
13 proceeding, be it civil, criminal, administrative, judicial, investigative or adjudicatory.” *Doe ex*
14 *rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000). “However, in the civil
15 context, the invocation of the privilege is limited to those circumstances in which the person
16 invoking the privilege reasonably believes that his disclosures could be used in a criminal
17 prosecution, or could lead to other evidence that could be used in that manner.” *Id.* “The only
18 way the privilege can be asserted is on a question-by-question basis, and thus as to each question
19 asked, the party has to decide whether or not to raise his Fifth Amendment right.” *Id.*
20 Accordingly, “the assertion of the privilege necessarily attaches only to the question being asked
21 and the information sought by that particular question.” *Id.* at 1265.

22 “Parties are free to invoke the Fifth Amendment in civil cases, but the court is equally free
23 to draw adverse inferences from their failure of proof.” *S.E.C. v. Colello*, 139 F.3d 674, 677 (9th
24 Cir. 1998). “Moreover, a district court has discretion in its response to a party’s invocation of the
25 Fifth [Amendment],” including excluding evidence disputing the other party’s evidence or
26 supporting his own. *Id.*; *see also Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 910 (9th Cir.
27 2008) (affirming district court’s preclusion of defendant’s testimony at trial based on defendant’s
28 earlier invocation of Fifth Amendment privilege during deposition).

1 “[N]o negative inference can be drawn against a civil litigant’s assertion of his privilege
2 against self-incrimination unless there is a substantial need for the information and there is not
3 another less burdensome way of obtaining that information.” *Glanzer*, 232 F.3d at 1265. “[A]n
4 adverse inference can be drawn when silence is countered by *independent evidence* of the fact
5 being questioned” *Id.* at 1264. “[W]hen there is no corroborating evidence to support the
6 fact under inquiry, the proponent of the fact must come forward with evidence to support the
7 allegation, otherwise no negative inference will be permitted.” *Id.* “The district court must [also]
8 determine whether the value of presenting the evidence is substantially outweighed by the danger
9 of unfair prejudice to the party asserting the privilege.” *Nationwide Life Ins.*, 541 F.3d at 912
10 (internal punctuation omitted).

11 **III. DISCUSSION**

12 **A. Employees’ Testimony**

13 There is no basis for excluding the eight employees’ testimony: whether they filed tax
14 returns is irrelevant to this proceeding. All eight deponents invoked their Fifth Amendment
15 privilege only in response to the defense counsel’s very narrow question of whether or not they
16 brought their tax returns with them to their depositions in compliance with the defendants’
17 subpoenas. *See* Perez Tr. 37:20-39:16; Santos Tr. 16:10-17:22; Hernandez Tr. 195:3-199:10;
18 Tizol Tr. 14:14-16:19; Sandoval Tr. 17:20-19:2; Noel Viera Tr. 96:2-100:8; Meija Tr. 15:23-16:5,
19 130:9-14; Victor Viera Tr. 10:12-11:7, 31:16-32:5. The defendants have pointed to no other
20 instance in which the deponents refused to respond to a question or failed to produce subpoenaed
21 materials. Defense counsel does not appear to have followed up on the deponents’ privilege
22 invocation with any other questions about their tax returns. On the other hand, seven of the eight
23 deponents answered counsel’s questions about cash payments, testimony that the defendants now
24 seek to exclude.³ *See* Perez Tr. 61:11-63:1; Santos Tr. 71:1-72:1, 73:16-76:2; Hernandez Tr. 23:7-
25 25:18, 36:4-18, 238:20-239:5, 250:24-251:9; Tizol Tr. 49:9-51:4; Sandoval Tr. 22:1-23:1, 30:24-
26 31:7; Noel Viera Tr. 107:1-108:11; Meija Tr. 36:4-37:7, 64:5-66:19.

27 _____
28 ³ The defendants point to no evidence that the eighth deponent, Victor Viera, refused to answer
questions about cash payments.

1 Any exclusion of testimony based on the deponents’ refusal to answer counsel’s questions
2 is limited to the precise issues about which counsel asked. The deponents did not invoke the Fifth
3 Amendment in response to questions about cash payments or hours worked. Because “the [Fifth
4 Amendment] privilege necessarily attaches only to the question being asked and the information
5 sought by that particular question,” *Glanzer*, 232 F.3d at 1265, and the deponents only refused to
6 say whether or not they brought their tax returns with them to the deposition, at most, only
7 subsequent testimony that they filed or have tax returns would warrant preclusion. There is no
8 ground for excluding testimony by the deponents about the hours that they worked or that they
9 received payments in cash from the defendants on the basis that they should have filed tax returns
10 and, if they did, that the income they reported would be dispositive regarding their credibility.
11 The defendants’ theory of relevance is speculative and tangential to the claims in this case.

12 Nor is there any reason to draw an adverse inference based on the deponents’ invocation of
13 their Fifth Amendment privilege. A court may allow an adverse inference if there is independent
14 evidence of the fact at issue. *Glanzer*, 232 F.3d at 1264. The defendants ask for the inference that
15 Seafood Peddler paid no cash to its employees.⁴ MIL Br. 13-14. While the defendants claim that
16 there is “ample independent evidence” supporting that conclusion, the “evidence” that they
17 provide—such as that “[t]here is no evidence that the deponent witnesses deposited large sums, on
18 pay days in which they received pay checks or otherwise, into their back accounts” or that the
19 deponents “nearly always cashed their paychecks . . . at a retail check cashing facility,” MIL Br.
20 14-15—hardly shows that the defendants made no cash payments to the deponents. Indeed, the
21 defendants have not provided any evidence on the narrower, irrelevant subject that drew the
22 assertions of the Fifth Amendment privilege: whether the deponents filed or have tax returns at
23 all.⁵ The inference the defendants seek to draw is unrelated to the invocations of the Fifth
24

25 ⁴ “[T]his case presents the unusual situation in which Defendants are seeking adverse inference
26 instructions against [the Secretary] based on the invocation of the Fifth Amendment by a non-
27 party witness” *Cotton v. City of Eureka*, No. 08-cv-4386-EDL, 2010 WL 2889498, at *4
28 (N.D. Cal. July 22, 2010). There does not appear to be any Ninth Circuit authority addressing
whether a court can grant such a request, but I need not decide this issue because even if it was
possible, the defendants have not met their burden to seek this relief.

⁵ The defendants also fail to show any “substantial need” for information about the deponents’ tax
returns or that any probative value of the tax returns outweighs any unfair prejudice that may arise

1 Amendment privilege.⁶

2 Defendants argue that it is unfair to allow the employees to testify since they have no
3 documents to support their testimony and refuse to answer questions about their tax returns. If
4 their tax returns had a direct relation to the Secretary's causes of action, I might agree. Because
5 they do not, the motion *in limine* to exclude the deponents' testimony on cash payments and to
6 draw the adverse inference against the Secretary sought by the defendants is DENIED.

7 **B. "Eastwood Report"**

8 As an initial matter, although the defendants ask that I exclude the "Eastwood Report," the
9 defendants do not identify in their motion what the "Eastwood Report" is or where it can be found.
10 The Secretary notes in his opposition brief that the "report" is presumably "an eight-page,
11 incomplete spreadsheet titled 'Wage Transcription and Computation Sheet' prepared by Wage and
12 Hour Investigator Michael Eastwood," which appears as Exhibit L to the Eytan Declaration, but
13 which the declaration incorrectly identifies as Exhibit K. *See* MIL Opp'n 20; Dkt. Nos. 238, 255.
14 The Secretary states that the spreadsheet is a Department of Labor investigator's draft computation
15 of back wages owed to the 14 employees identified in the Complaint. MIL Opp'n 20-21 (citing
16 Eastwood Decl. (Dkt. No. 284-4) ¶ 6, Ex. A).

17 This motion is premature given that the Secretary states that he does not intend to use this
18 document as a trial exhibit or to rely on it to prove damages at trial. MIL Opp'n 21. But just as
19 there is no basis to exclude the deponents' testimony about cash payments, there is no basis at this
20 juncture for excluding the "Eastwood Report." The "report" consists of graphs filled with dollar
21 amounts that appear to be calculations of wages owed. Eytan Decl. Ex. L (Dkt. No. 255). The
22

23 from presenting evidence about the returns.

24 ⁶ The employees' credibility will be central to this case. The personal interest each has in the
25 Secretary's potential victory (such as payment of back wages) and the lack of documentation to
26 support their testimony are valid subjects for exploration. But an attack based on the assertion of
27 the Fifth Amendment privilege to questions about income tax returns or on the employees'
28 immigration status would be more prejudicial than probative and will not be allowed at trial.
Whether the deponents filed tax returns is not at issue in this case—whether they were paid for
hours worked is. Whether the deponents have paperwork to support their testimony is not
dispositive of any claim in this case—whether the defendants have the paperwork required by the
Fair Labor Standards Act is. The trial in this case is not about the immigration status of the
deponents; it is about the defendants' own compliance with the law.

1 mere fact that the deponents refused to answer the defense counsel’s question about whether they
2 brought their tax returns with them to their depositions does not merit exclusion from evidence of
3 this document or the information in it. Indeed, there is no apparent link between the document and
4 the deponents other than the defendants’ unsupported assertion that “the Eastwood Report relies
5 almost entirely upon the unsupported statements of the Employees.” MIL Br. 20. The
6 information in the “report” is unrelated to the narrow issue about which the deponents refused to
7 answer and therefore should not be excluded.

8 The motion *in limine* to exclude the “Eastwood Report” and information therein is
9 DENIED.⁷

10 **MOTION FOR PARTIAL SUMMARY JUDGMENT**

11 **I. LEGAL STANDARD**

12 Summary judgment is proper “if the movant shows that there is no genuine dispute as to
13 any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a).
14 The moving party bears the initial burden of demonstrating the absence of a genuine issue of
15 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however,
16 has no burden to disprove matters on which the non-moving party will have the burden of proof at
17 trial. The moving party need only demonstrate to the court “that there is an absence of evidence to
18 support the non[-]moving party’s case.” *Id.* at 325.

19 Once the moving party has met its burden, the burden shifts to the non-moving party to
20 “designate specific facts showing a genuine issue for trial.” *Id.* at 324 (quotation marks omitted).
21 To carry this burden, the non-moving party must “do more than simply show that there is some
22 metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
23 475 U.S. 574, 586 (1986). “The mere existence of a scintilla of evidence . . . will be insufficient;
24 there must be evidence on which the jury could reasonably find for the [non-moving party].”

25
26 _____
27 ⁷ The defendants also move to exclude all statements made to any of the Secretary’s
28 representatives as hearsay. MIL Br. 21. But the defendants do not explain why such statements
are hearsay and must be excluded—they provide no explanation at all. At best, such a motion is
premature. The motion *in limine* to exclude all statements made to the Secretary’s representatives
as hearsay is DENIED.

1 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

2 In deciding a summary judgment motion, the court must view the evidence in the light
3 most favorable to the non-moving party and draw all justifiable inferences in its favor. *Id.* at 255.
4 “Credibility determinations, the weighing of the evidence, and the drawing of legitimate
5 inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for
6 summary judgment.” *Id.* However, conclusory or speculative testimony in affidavits is
7 insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ’g*
8 *Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Similarly, “uncorroborated and self-
9 serving” testimony that “flatly contradicts [] prior sworn statements” cannot create a genuine
10 issue of fact. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996).

11 A district court need not consider evidence in the record “unless it is brought to the district
12 court’s attention” because the court is “not required to comb the record to find some reason” to
13 grant or deny summary judgment; rather, “if a party wishes the court to consider [evidence for a
14 particular issue], the party should bring that desire to the attention of the court.” *Carmen v. S.F.*
15 *Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (citation and internal punctuation
16 omitted); *see also Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (stating that the court is not
17 obligated “to scour the record in search of a genuine issue of triable fact”).

18 **B. DISCUSSION**

19 The defendants argue that “once the oral and affidavit testimony of one or all of the eight
20 former Employees is set aside by an exclusion order, as requested in the accompanying *in limine*
21 motion, the Secretary cannot meet [his] ‘initial responsibility’ to provide admissible evidence to
22 create a genuine issue of material fact.” Mot. 4-5. In particular, they contend that “the Secretary
23 cannot sustain [his] burden because the claim [concerning] unpaid overtime fails if [there were] no
24 cash payments, as alleged by the eight Deponents and by the Eastwood Report,” because it would
25 be “simply too improbable” to believe that the employees worked overtime for 12 years without
26 having been paid overtime in cash. Mot. 5. But, the defendants state, “If defendants’ *in limine*
27 motion fails as to the central cash payment issue, so that the eight Deponent Employees may
28 submit affidavit statements in opposition to this motion claiming in such affidavits that they

1 received large sums as cash payments, then this motion must fail too.” Mot. 6. Counsel for the
2 defendants reaffirmed this point at the hearing.

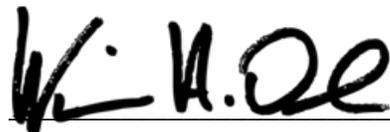
3 Because I am denying the defendants’ motion *in limine*, as the defendants concede their
4 partial motion for summary judgment fails. There are a plethora of disputed material facts, some
5 of which are: whether the defendants made cash payments to its employees; whether employees
6 worked any overtime at all; whether the defendants’ pay records are accurate; and whether
7 Seafood Peddler even had sufficient cash on hand to support the alleged scheme. Indeed, whether
8 I granted the motion *in limine* or not, the defendants still would not have been able to carry their
9 burden of showing “that there is no genuine dispute as to any material fact and [they are] entitled
10 to judgment as a matter of law.” FED. R. CIV. P. 56(a).

11 **CONCLUSION**

12 I will not take the adverse inference requested by the defendants as a result of the assertion
13 of the Fifth Amendment privilege by the eight employees, will not exclude their testimony, and
14 instead DENY the defendants’ motions *in limine*. This case has multiple disputed issues of
15 material fact. The defendants’ motion for partial summary judgment is also DENIED.

16 **IT IS SO ORDERED.**

17 Dated: June 20, 2014

18 

19 WILLIAM H. ORRICK
20 United States District Judge