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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 R. ALEXANDER ACOSTA, Secretary of
12 Labor, United States Department of
13 Labor,

14 Petitioner,

15 v.

16 JY HARVESTING, INC., a suspended
17 California corporation; JOSE JESUS
18 PINEDO, an individual, as the Custodian
19 of Records for JY HARVESTING, INC.,

20 Respondent.

Case No.: 17-CV-1225-CAB-WVG

**ORDER GRANTING PETITIONER'S
PETITION TO ENFORCE
ADMINISTRATIVE SUBPOENA
DUCES TECUM**

[ECF No. 1]

21 **I. INTRODUCTION**

22 Presently before the Court is Petitioner R. Alexander Acosta, Secretary of Labor,
23 United States Department of Labor's ("Petitioner"), Petition to Enforce ("Petition") an
24 administrative subpoena *duces tecum* served on Respondents JY Harvesting, Inc. and Jose
25 Jesus Pinedo as the Custodian of Records for JY Harvesting, Inc. (collectively
26 "Respondents").

27 For the reasons that follow, Petitioner's motion is **GRANTED**.

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1 **II. BACKGROUND**

2 Petitioner began an administrative investigation of Respondents following a very
3 serious automobile accident that caused multiple serious injuries and the death of a seasonal
4 agricultural worker. (Rios Decl., ECF No. 1-4 at ¶ 5.) On March 15, 2017, a 2002 Chevy
5 Express Van, owned by Respondent Pinedo, was supplied to Fernando Pinedo Garcia,
6 doing business as Healthy Harvesting, to transport seasonal agricultural workers.^{1, 2} (*Id.*)
7 While traveling, a tire catastrophically failed causing the van to roll numerous times. (*Id.*)
8 The California Highway Patrol referred the accident to the Wage and Hour Division of the
9 United States Department of Labor (“Wage and Hour”). (*Id.*)

10 On March 16, 2017, Steven Albert Rios, an investigator for Wage and Hour, was
11 assigned to and began investigation of the accident pursuant to the Migrant and Seasonal
12 Agricultural Worker Protection Act (“MSPA”), 29 U.S.C. § 1801, *et seq.* (Rios Decl. at ¶
13 7.) On March 24, 2017, Ruben J. Rosalez, Regional Administrator of the Western Region
14 of Wage and Hour Division, issued an administrative subpoena *duces tecum*, directing
15 Respondents to provide requested documents on April 3, 2017.³ (Rosalez Decl., ECF No.
16 1-3 at ¶ 2-3.) The subpoena was served on Respondents on March 28, 2017. (*Id.* at ¶ 4;
17 Rios Decl. at ¶ 9.) Production of documents was made by Respondents on April 14, 2017.
18 (Rosalez Decl. at ¶ 5; Hernandez Decl., ECF No. 7 at ¶ 4.) On April 24, 2017, Rios and
19 Hernandez engaged in a meet and confer regarding the completeness of Respondents’
20 production. (Rios Decl. at ¶ 14; Hernandez Decl., ECF No. 7 at ¶ 5.) Respondents
21 supplemented their production on May 31, 2017, provided seven additional documents in
22 response to Request No. 3 and asserted that Respondents had no documents responsive to
23 Request Nos. 4 and 6. (Rios Decl. at ¶ 15; Hernandez Decl. at ¶ 5.) This response also
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26 ¹ Petitioner asserts that Respondent Jose Jesus Pinedo and Fernando Pinedo Garcia, owner of Healthy
27 Harvesting, are related by marriage. (*See* Rios Decl. at ¶ 6.)

28 ² The Court notes the facts regarding the accident and vehicle ownership are asserted by Petitioner only.
However, Respondents did not dispute the facts in their Response in Opposition.

³ The date that actually appears on the subpoena is April 3, 2016. Petitioner states this was merely a
typographical error and Respondents do not argue this amounts to a procedural error.

1 included an objection to Request No. 7 based on California Rule of Professional Conduct
2 2-100. (Hernandez Decl. ¶ 5.)

3 On June 16, 2017, Petitioner filed a Petition to Enforce Administrative *Duces*
4 *Tecum*. (Petition, ECF No. 1.) Respondents filed a timely Response in Opposition on July
5 7, 2017. (Opposition, ECF No. 6.) Petitioner timely filed a Reply. (Reply, ECF No. 10.)

6 **II. LEGAL STANDARD**

7 The Ninth Circuit Court of Appeals has explained that “[t]he scope of the judicial
8 inquiry in [] any [] agency subpoena enforcement proceeding is quite narrow. The critical
9 questions are: (1) whether Congress has granted the authority to investigate; (2) whether
10 procedural requirements have been followed; and (3) whether the evidence is relevant and
11 material to the investigation.” *E.E.O.C. v. Federal Exp. Corp.*, 558 F.3d 842, 848 (9th Cir.
12 2009) (internal quotation omitted). “If these factors are shown by the agency, the subpoena
13 should be enforced unless the party being investigated proves the inquiry is unreasonable
14 because it is overbroad or unduly burdensome.” *E.E.O.C. v. Children's Hosp. Med. Ctr. of*
15 *N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc) (overruled on other grounds); *see*
16 *also U.S. E.E.O.C. v. Ayala AG Services*, 2013 WL 5670901, at *2 (2013 E.D. Cal.).

17 **IV. DISCUSSION**

18 Petitioner claims that Respondents’ responses to Requests Nos. 3, 4, and 6 are
19 deficient. Petitioner also claims that Respondents have lodged an improper objection to
20 Request No. 7.

21 Respondents do not dispute that Congress has granted Wage and Hour authority to
22 investigate nor do they contend that Petitioner failed to follow the procedural requirements.
23 Respondents also do not claim the evidence sought is irrelevant, overboard, or unduly
24 burdensome. Instead, Respondents argue they have provided all documents responsive to
25 Request No. 3, and have no documents responsive to Request Nos. 4 and 6. Lastly,
26 Respondents argue that Petitioner must agree to comply with California Rule of
27 Professional Conduct 2-100 before responding to Request No. 7 completely.

28 The Court will discuss each in turn.

1 **A. Petition’s Enforcement**

2 It is undisputed that Congress has granted the Secretary of the Department of Labor
3 the authority to “investigate” compliance with the MSPA. 29 U.S.C. § 1862(a). In doing
4 so, “[t]he Secretary may issue subpoenas requiring the ... production of any evidence in
5 connection with such investigations.” 29 U.S.C. § 1862(b). The subpoena was properly
6 issued by a Regional Administrator by delegation of authority from the Secretary, *see*
7 Secretary’s Order 5-2010 5(C), 75. Fed. Reg. 55352-55354 (2010), and served on
8 Respondents, (Rosalez Decl. at ¶ 4.) Lastly, Petitioner claims the information sought is
9 highly relevant and material to the investigation. (Pet. at ¶ 19.) Respondent does not dispute
10 this claim. Given this, Petitioner has shown the subpoena should be enforced unless
11 Respondents can show the inquiry is overly broad or unduly burdensome.

12 **B. Request No. 3**

13 Request No. 3 seeks:

14 All documents regarding all vehicles owned, leased or rented
15 since November 1, 2015 used to transport agricultural workers
16 including registration documents, smog certificates, repair
17 records.”

17 (Rosalez Decl., Ex. 1 at 7.)

18 Petitioner claims the initial production of documents contained “no documents”
19 responsive to Request No. 3. (Petition, ECF No. 1 at 5 ¶ 14.) Petitioner also claims that
20 Respondents’ supplemental production on May 31, 2017, which contained seven invoices,
21 was also deficient. (*Id.* at ¶ 16.) In support of this argument, Petitioner includes invoices
22 received from Fernando Pinedo Garcia, doing business as Healthy Harvesting. (*See* Supp.
23 Garcia Decl., Ex. 8, ECF No. 10-1 at 4-12.) Petitioner claims that because the invoices
24 received from Fernando Pinedo Garcia are different than the invoices received from
25 Respondents, Respondents are either withholding documents or not being diligent in their
26 search for responsive documents. (Reply at 4:1-2.)

27 Respondents claim they have produced all documents responsive to Request No. 3.
28 (Hernandez Decl. at ¶ 5.) Respondents’ counsel indicated to Petitioner via email that, as of

1 the supplemental production, they “have produced all documents responsive to this request
2 [...]” (Hernandez Decl., Ex. C at 2.) Additionally, Respondents have represented to the
3 Court in their Opposition they “have already produced all documents within its custody
4 and possession responsive to [Request No. 3].” (Opp’n. at 2:13-16.) In support of this
5 claim, Respondents attached as an exhibit the documents produced to Petitioner in the
6 initial production, (*see* Hernandez Decl., Ex. B,) and also attached their supplemental
7 response to Request No. 3, (*see Id.*, Ex. C).

8 At the outset, a review of the documents supplied by Respondents shows that
9 Petitioner’s claim that there were no documents responsive to Request No. 3 in the initial
10 production is inaccurate. The documents provided in the initial production included
11 numerous vehicle documents, including copies of Certificates of Titles for various vehicles,
12 dozens of pages of insurance documents for various vehicles, one of which is proof of
13 insurance for a 2002 Chevy Express van. (*See* Hernandez Decl., Ex. B at 82.)

14 Petitioner’s assertion that because production from Healthy Harvesting differs from
15 the production made by Respondents, a presumption of incomplete production exists. This
16 argument is unpersuasive. First, Petitioner provides no authority supporting such a
17 presumption. Second, while it is *possible* that Respondents have the same invoices that
18 were produced by Healthy Harvesting, it is equally possible that Respondents simply no
19 longer have the invoices in question. Perhaps Respondents sent the only copy of the
20 invoices to Healthy Harvesting or perhaps Respondents simply do not maintain complete
21 records due to the alleged familial relationship between the companies’ respective owners.

22 Respondents have plainly asserted to Petitioner and to the Court that no further
23 documents exist that are responsive to Request No. 3. The Court cannot compel production
24 of that which does not exist or is not in the possession and control of Respondents.
25 Numerous federal courts dealing with various cases in discovery or discovery-like
26 proceedings have held as much. *See, e.g., Lamon v. Adams*, 2015 WL 1879606, at * 3 (E.D.
27 Cal. 2015) (pursuant to the Federal Rules of Civil Procedure, a court cannot compel
28 production of documents that do not exist); *Cormack v. United States*, 117 Fed Cl. 392,

1 408 (Fed. Cl. 2014) (court of federal claims “cannot compel [a party] to produce documents
2 that it insists do not exist”); *Alexander v. F.B.I.*, 194 F.R.D. 305, 310 (D.D.C. 2010) (same);
3 *In re Wright*, 2005 WL 6488101, at *6 (Bnkr. N.D. Ga. (2005) (a bankruptcy court may
4 only compel the production of things in existence); *see also* 8A CHARLES A. WRIGHT,
5 ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE AND
6 PROCEDURE § 2210 (2d ed. 1994) (“[A] party can not be required to permit inspection
7 of documents or things that it does not have and does not control.”). While the Court is
8 aware these cases deal with issues outside the purview of an administrative subpoena, the
9 logic is equally applicable here and Petitioner offers no authority to the contrary.

10 Notwithstanding the above analysis, the Court must grant the Petition in light of the
11 minimal requirements for the enforcement of administrative subpoenas and Respondents’
12 failure to satisfy their burden.

13 **C. Request Nos. 4 and 6**

14 Request No. 4 seeks:

15 All communications including text messages, emails, letters, and
16 other writings with Healthy Harvest, Fernando Pinedo Garcia or
17 his family regarding transportation of Healthy Harvest workers
since November 1, 2015.

18 (Rosalez Decl., Ex. 1 at 7.)

19 Request No. 6 seeks:

20 All communications, including emails, texts and documents,
21 referencing any lease, rental agreement or understanding
22 between you and Healthy Harvesting regarding vehicles used to
23 transport workers to Fisher Ranch since November 1, 2015,
24 including the transport of workers in the 2002 Chevy Express
Van on March 15, 2017.

25 (*Id.*)

26 Petitioner claims no responsive documents were received for these requests during
27 the initial production, which occurred on April 14, 2017. (Pet. at ¶ 14.) Petitioner asserts
28 the records responsive to Request Nos. 4 and 6 are “relevant and necessary” to the

1 investigation, (*id.* at ¶ 19,) and “will aid and assist” the on-going investigation of
2 Respondents, (*id.* at ¶ 20.) Without the records and documents, Wage and Hour “cannot
3 complete a thorough investigation” of Respondents, the incident at issue, and other possible
4 violations of MSPA. (*Id.* at ¶ 21.) Additionally, Petitioner claims it is simply “not credible”
5 that Respondents have no documents responsive to Request Nos. 4 and 6 because of
6 evidence showing \$671,126 in transactions between Respondents and Healthy Harvesting.
7 (Reply at 4:7-22.)

8 Respondents “unambiguously” represent that no documents exist that are responsive
9 to Request Nos. 4 and 6. (Opp’n. at 2:14-16.)

10 The analysis to these Requests is nearly identical to Request No. 3: the Court cannot
11 compel that which a party asserts it does not possess. Moreover, Petitioner’s claim that it
12 is “not credible” that Respondents do not possess any responsive documents despite the
13 reporting of nearly \$700,000 worth of transactions between Respondents and Healthy
14 Harvesting is, again, unpersuasive. Petitioner’s assertion rests solely on the invoices
15 provided by Respondents and those provided by Healthy Harvesting. As an example, an
16 invoice provided by Petitioner shows Respondent JY Harvesting billed Healthy Harvesting
17 for 11 trailers, 10 buses, 5 dollies, 9 tractors, and 650 gallons of diesel. (Supp. Garcia Decl.,
18 Ex. 8 at 5.) However, nowhere on this invoice does it indicate any of the items billed were
19 “regarding transportation of Healthy Harvest workers” as requested in Request No. 4.
20 Additionally, nowhere on this invoice does it indicate any of the items billed were
21 “regarding vehicles used to transport workers to Fisher Ranch” as requested by Request
22 No. 6. Each invoice provided by Petitioner and Respondents lacks the same critical
23 information of which Petitioner relies. Given this, these invoices provide little evidence at
24 best. At worst, the invoices provide no evidence supporting the assertion that documents
25 exist that are responsive to Request Nos. 4 and 6.

26 Notwithstanding the above analysis, the Court must grant the Petition in light of the
27 minimal requirements for the enforcement of administrative subpoenas and Respondents’
28 failure to satisfy their burden.

1 **D. Request No. 7**

2 Request No. 7 seeks:

3 Documents sufficient to identify all persons who work as crew
4 leaders, foremen or supervisors by name, address, telephone
5 number and job duties.

6 (Rosalez Decl., Ex. 1 at 7.)

7 Petitioner asserts that Respondents would only produce documents responsive to this
8 request on the condition that “DOL, or any of its agents, agree to refrain from having any
9 communication with its supervisory personnel without the presence of counsel.” (Pet. at ¶
10 17.) Petitioner argues this is an improper objection to an administrative subpoena.

11 Respondents objected to the production of contact information of its supervisors and
12 foreman, during a meet and confer that occurred on April 24, 2017. (Opp’n. at 4:21-24; *see*
13 *also* Hernandez Decl. ¶ 5.) Respondents concede they have “yet to produce any documents
14 responsive to” Request No. 7 with the exception of a list of foreman and supervisors
15 employed during the 2016 season. (Opp’n at 2:19-22.) Respondents contend they are
16 willing to produce responsive documents on the condition that Petitioner comply with
17 California Rule of Professional Conduct 2-100. (*Id.* at 2:23-25.)

18 California Rule of Professional Conduct 2-100 states that, absent consent from
19 opposing counsel, “[w]hile representing a client, a member shall not communicate directly
20 or indirectly about the subject of the representation with a party the member knows to be
21 represented by another lawyer in the matter []. Cal. Prof. Conduct R. 2-100(A). A
22 “member” is a “member[] of the State Bar...” Cal. Prof. Conduct R. 1-100(A).

23 Respondents’ reliance on California Rule of Professional Conduct 2-100 is
24 misplaced. First, and most importantly, Respondents’ objection to production based on the
25 Conduct Rule does not fall within the narrow scope of objections permitted for
26 administrative subpoenas. For this reason alone, the Court would overrule Respondents’
27 objection.

28 However, Respondent’s objection is also overruled on ripeness grounds. Petitioner’s

1 Request No. 7 seeks only identification and contact information for crew leaders, foremen,
2 or supervisors, and not to depose or otherwise interview those listed. While such contact
3 may be a logical step in the future, it is not an issue at the present time. Given this, the
4 Court would also overrule Respondents' objection as it is not yet ripe.

5 For the foregoing reasons, Respondents' objection to Request No. 7 is

6 **OVERRULED.**

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1 **V. CONCLUSION**

2 Since Respondents do not contest the authority of Petitioner, do not claim Petitioner
3 failed to follow the procedural requirements, do not claim the evidence sought is irrelevant,
4 overboard, or unduly burdensome, the Court **ORDERS** as follows:

5 1. Respondents' objection to Request No. 7 is **OVERRULED**.

6 2. Petitioner's application for an order to enforce the subpoena issued is
7 **GRANTED**.

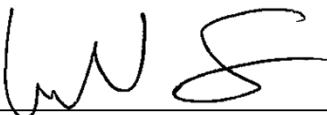
8 3. Respondents are **ORDERED** to produce any outstanding documents requested in
9 Petitioner's subpoena *duces tecum* at the Wage and Hour Division, United States
10 Department of Labor, 550 West C Street, Suite 990, San Diego, California, on or
11 before **August 25, 2017**.

12 4. If Respondents are unable to provide any of the documents and information set
13 forth in the subpoena, Respondents shall submit a declaration under penalty of
14 perjury that: (1) such documents and information do not exist or are not within
15 respondent's custody, possession or control; (2) a diligent search was conducted, and
16 describe in sufficient detail the processes that were taken, in an attempt to locate
17 responsive documents; and (3) that no documents were destroyed in anticipation of
18 the present investigation.

19 5. Respondents are cautioned that failure to comply with this order may result in the
20 issuance of sanctions including contempt sanctions.

21 **IT IS SO ORDERED.**

22 Dated: August 10, 2017

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25 Hon. William V. Gallo
26 United States Magistrate Judge
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