No. 12-4028

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HILDA SOLIS, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner-Appellee,

v.

CSG WORKFORCE PARTNERS, LLC, ET AL.,

Respondents-Appellants.

On Appeal from the United States District Court for the
District of Utah Central Division, Honorable Tena Campbell

BRIEF FOR THE SECRETARY OF LABOR

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ORAL ARGUMENT
NOT REQUESTED

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STATEMENT OF RELATED CASES

Pursuant to 10th Cir. R. 28.2(C)(l), the Secretary states that an appeal is pending before this Court in CSG Workforce Partners LLC et al. v. Watson, No. 12-4027 (docketed Feb. 14, 2012), a case with substantially the same issues raised in the instant case. The case arises from the same events, involves the same parties, and essentially addresses the same legal questions relating to the appropriateness of the subpoena. By Order dated March 14, 2012, this Court granted in part CSG's motion to consolidate the cases. The Court directed the cases to be separately briefed, with separate and unrelated appendices, although they will be assigned to the same panel of judges for disposition.

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BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this subpoena enforcement matter under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. 217, 28 U.S.C. 1331 (federal question), and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). This Court has jurisdiction to review District Court Judge Tena Campbell's February 1, 2012 Order of Enforcement of Administrative Subpoena pursuant to 28 U.S.C. 1291 (final decisions of district

courts); see EEOC v. Citicorp Diners Club, Inc., 985 F.2d 1036, 1038 (10th Cir. 1993) (citation omitted). A timely Notice of Appeal from the district court's order was filed by Respondents-Appellants CSG Workforce Partners, LLC, and its six related CSG trade LLCs ("CSG") on February 14, 2012. R. 30 (App. 000006).[1]

STATEMENT OF THE ISSUE

Whether the district court abused its discretion by enforcing the Secretary of Labor's ("Secretary") administrative subpoena that was issued prior to the Secretary having established that CSG "member-partners" are employees subject to the FLSA.

STATEMENT OF THE CASE

Statement of Facts and Course of Proceedings

In June 2010, the Department of Labor's ("Department") Wage and Hour Division ("Wage and Hour" or "WHD") initiated an investigation of CSG to ensure that the company's workers are receiving the wages to which they are entitled under the FLSA. See Aff. of Pamela Reed, Assistant District Director, Salt Lake City, Wage and Hour ("Reed Aff.") ¶ 2 (App. 000013-14). CSG is a staffing company that operates primarily in the construction industry. See id. ¶ 3 (App.

[1] References to the civil docket from the district court proceedings are indicated as "R. (number corresponding to civil docket entries reprinted in Appellants' Record Appendix)"; references to Appellant's Record Appendix are cited as "App. (Record Appendix page number(s))."

000014). The laborers that CSG provides to its clients are individuals and organizations who have entered into "member-partnership" agreements with CSG. See id. CSG frequently converts its clients' employees into member-partners, and sends those member-partners back to the client companies to work. See id. As Wage and Hour investigator Tad Starr explained in an affidavit submitted to the court in support of the Department's subpoena enforcement petition:

> CSG's clients, in many instances, have their laborers sign a membership agreement with CSG, thereby getting their employees "off the books" and the laborers, as CSG member-partners continue to work with their former employer through a "Service Agreement" between CSG and its client (former employer). However, CSG member-partners are no longer treated – under the FLSA and applicable tax regulations – as employees. Many of the CSG member-partners I interviewed told me that everything was the same after they signed membership agreements with CSG. That is, they worked at the same job site, alongside the same crew members, continued to be supervised by the same foreman, and did the same work. What changed was their tax and overtime treatment.

Aff. of Tad Starr, Wage and Hour Investigator, ¶ 4 (App. 000029-30). WHD's investigation seeks to determine in particular whether CSG's approximately 821 "member-partners" are exempt from the FLSA as bona fide partners of CSG;[2] are employees of CSG; and/or are joint employees of CSG and CSG's clients, and if

[2] As CSG correctly points out (Br. 37 (citing Wage and Hour Field Operations Handbook ("FOH"), ¶ 10c01)), bona fide, self-employed "partners" are not employees for purposes of the FLSA. However, as discussed infra, the partner-partnership relationship must be genuine; "calling individuals who are essentially employees by the term 'partners'" does not take those individuals outside of the Act's protections. See FOH ch. 10, ¶ 10c01, available at http://www.dol.gov/whd/FOH/FOH_Ch10.pdf.

they are not, whether they are being properly paid under the Act. See Reed Aff. ¶ 3 (App. 000014); Starr Aff. ¶ 8 (App. 000031) (CSG's failure to turn over all of the documents requested is preventing WHD from determining the nature of the relationship between CSG, its clients, and its member-partners, as well as the hours worked by the member-partners).

The Department requested specific documents from CSG in furtherance of its investigation seeking among other things, documents reflecting hours worked for current or former CSG members, service agreements and contracts between CSG and other entities, work invoices, time sheets, and other documents used for billing purposes, as well as documents indicating the annual dollar volume for each LLC comprising the CSG enterprise. See Reed Aff. ¶¶ 7-9 (App. 000015-17). When CSG failed to voluntarily produce all of the records despite repeated requests, the Department, on August 31, 2011, served CSG with an administrative subpoena duces tecum ("subpoena") pursuant to section 9 of the FLSA, 29 U.S.C. 209. See Wage and Hour Subpoena (App. 000025-27).

On September 27, 2011, the Department sought enforcement of its subpoena in the United States District Court for the District of Utah. See Pet. to Enforce Administrative Subpoena (App. 00008-12). Magistrate Judge David Nuffer held a Show Cause hearing on October 24, 2011, and issued a Report and Recommendation on November 1, 2011, to grant DOL's request to enforce the

subpoena. R. 17 (App. 00004); Report and Recommendation (App. 000144-49). In his recommendation to enforce the subpoena, Judge Nuffer concluded that the Department's documentation submitted in support of its subpoena, including affidavits by a Wage and Hour investigator and Assistant District Director, was sufficient to show that the subpoena was not indefinite; was reasonably related to an investigation the Department was authorized to conduct; and that all administrative prerequisites had been met. Id. Judge Nuffer also concluded that CSG's argument that its member-partners are not covered by the FLSA was not appropriate in a subpoena enforcement context. Id. On December 16, 2011, Magistrate Judge Nuffer issued a Report and Recommendation to deny CSG's subsequent Motion to Dismiss, or in the Alternative to Stay, the Department's Petition to Enforce Administrative Subpoena on the ground, inter alia, that CSG's Motion raised the same statutory coverage issues addressed at the subpoena enforcement hearing. R. 24 (App. 000173-75).

By Order dated February 1, 2012, the district court adopted Judge Nuffer's findings of fact and conclusions of law, and enforced the Secretary's subpoena on the ground, inter alia, that CSG had failed to show cause why it should not be compelled to comply, and ordered compliance with the subpoena within 30 days of the Order. (App. 000194-96). CSG filed a motion seeking to stay the district

court's order, which that court denied on April 20, 2012. R. 28, 40 (App. 000006-7).

On February 14, 2012, CSG timely filed an appeal of the district court's Order enforcing the Department's subpoena with this Court. R. 30 (App. 000006).[3] CSG filed a motion with this Court on May 4, 2012 to stay the district court's order pending appeal. That motion was denied on May 24, 2012.

SUMMARY OF ARGUMENT

It is well settled that the Secretary has authority to issue administrative subpoenas in the course of an investigation conducted pursuant to the FLSA, prior to determining coverage under the Act. See Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186 (1946). The Secretary's administrative subpoena issued in this case, which seeks, inter alia, specific records relevant to determining coverage

[3] After the Secretary issued her subpoena in this case, CSG initiated an action in district court against the Department seeking to quash the subpoena on substantially the same issues raised in this action. The district court's Order ruling against CSG in that case has also been appealed to this Court. See CSG Workforce Partners LLC et al. v. Watson, No. 12-4027. The case arises from the same events, involves the same parties, and essentially addresses the same underlying legal questions relating to the appropriateness of the subpoena. In Watson, the district court dismissed the action, concluding that the Secretary was within her "statutory authority under the FLSA to take the complained of actions." CSG filed notices of appeal in both the instant case and the Watson case on February 14, 2012. By Order dated March 14, 2012, this Court granted in part CSG's motion to consolidate the cases. The Court directed the cases to be separately briefed, with separate and unrelated appendices, although they will be assigned to the same panel of judges for disposition. See Order, March 14, 2012.

under the FLSA as well as of wages paid and hours worked by CSG workers, meets the minimal requisite standards for enforcement of such subpoena – appropriate congressional authorization, relevance, and reasonableness.

Because the Secretary's administrative subpoena issued in the present action was issued pursuant to a valid exercise of statutory authority, and is reasonably relevant to the agency's investigation, the district court did not abuse its discretion when it ordered enforcement of the Secretary's subpoena.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENFORCING THE SECRETARY'S ADMINISTRATIVE SUBPOENA, WHICH WAS ISSUED PURSUANT TO A VALID GRANT OF STATUTORY AUTHORITY AND IS REASONABLY RELEVANT TO THE AGENCY'S INVESTIGATION

A. Standard of Review

This court reviews a district court's rulings on subpoenas under an abuse of discretion standard. See EEOC v. Dillon Cos., 310 F.3d 1271, 1274 (10th Cir. 2002) (citing United States v. Castorena-Jaime, 285 F.3d 916, 930 (10th Cir. 2002)).

B. The District Court Correctly Enforced the Secretary's Administrative Subpoena That Was Issued Pursuant to a Valid Exercise of Statutory Authority and Is Reasonably Relevant to the Agency's Investigation

1. The FLSA requires covered employers to pay their non-exempt employees a minimum wage for all hours worked and a premium rate for all overtime hours worked. See 29 U.S.C. 206, 207. The Department is responsible for administering and enforcing the FLSA. See 29 U.S.C. 204, 211(a), 216(c), 217. Section 11(a) of the FLSA provides expansive authority to the Wage and Hour Administrator ("Administrator") and his or her designated representatives to:

> investigate and gather data regarding . . . conditions and practices of employment in any industry subject to this [Act], . . . 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 [Act], or which may aid in the enforcement of the provisions of this [Act].

29 U.S.C. 211(a).[4] Pursuant to this authority and in order to conduct thorough investigations into the wages, hours, and other conditions and practices of

[4] Section 11(c) states that --

> [e]very employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

29 U.S.C. 211(c); see 29 C.F.R. 516.1 (form of records required); 29 C.F.R. 516.7 (place for keeping records and availability for inspection).

employment, the Department's investigators regularly request records from employers, review and copy employers' records (including payroll records and records of hours worked), interview employees, and collect and review other relevant data relating to FLSA compliance. See, e.g., 29 C.F.R. Part 516 (setting forth an employer's recordkeeping requirements under the FLSA).

By its plain text, section 11(a)'s grant of investigative authority is broad.[5] The authority extends to "conditions and practices of employment in any industry" subject to the FLSA and expressly includes the power to inspect and copy records. 29 U.S.C. 211(a). Moreover, the Department may use its investigative authority to determine whether any person has violated the FLSA or to otherwise aid its efforts to enforce the Act. See id. Accordingly, the Department's investigation of CSG to ensure that employees are receiving the FLSA wages to which they are entitled is authorized by the Act. Section 11(a) likewise authorizes the Department's requests for documents from CSG in connection with that investigation.

Section 9 of the Act gives the Secretary authority to subpoena witnesses and documentary evidence relating to any matter under investigation. See 29 U.S.C.

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[5] As a general matter, the Supreme Court "has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985) (quoting Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959)).

209.[6] The Secretary has authorized the Administrator to issue subpoenas pursuant to section 9 of the FLSA. See Secretary's Order 5-2010, § 5.A.1 (Sept. 2, 2010), 75 Fed. Reg. 55,352, 55,353 (Sept. 10, 2010). Although the Department prefers to avoid resorting to its subpoena authority, it has the "power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." 15 U.S.C. 49. If the recipient of the subpoena fails to comply, the Department "may invoke the aid of any court of the United States in requiring" compliance. Id. The subpoena to CSG here –- which seeks documents that the Department has repeatedly requested in furtherance of its investigation and that CSG has refused to provide -–- has thus been issued pursuant to and is authorized by section 9 of the Act.

2. CSG argues (Br. 35-38) that the district court erred in enforcing the Department's subpoena because the Department has not yet established that CSG's "member-partners" are CSG employees who are covered by the FLSA. The Secretary's authority to issue administrative subpoenas duces tecum in the course

[6] Section 9 states that "[f]or the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees." 29 U.S.C. 209. In turn, the Federal Trade Commission "shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." 15 U.S.C. 49.

of conducting investigations pursuant to the FLSA, but prior to a determination of coverage, was upheld by the Supreme Court in Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186 (1946). In that case, the Court specifically held that the FLSA provides the Secretary authority to issue a subpoena prior to determining not only whether there are any violations of the FLSA, but whether the entity is covered under the Act. Id. at 214. In other words, "[t]he very purpose of the subpoena . . . as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." Id. at 201. The Court in Oklahoma Press explicitly stated that Congress was acting within its authority when it extended these investigative powers to the Secretary of Labor:

> Congress has authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the District Court in enforcing it.

327 U.S. at 214 (emphasis added).

Thus, it is well settled that where Congress has properly authorized an administrative agency to conduct investigations, as it has done vis-à-vis the Department of Labor under the FLSA, the agency "is not required to establish

coverage under a particular federal law when it seeks judicial enforcement of its subpoena." Donovan v. Shaw, 668 F.2d 985, 989 (8th Cir. 1982); see EEOC v. Fed. Express Corp., 558 F.3d 842, 851 n.3 (9th Cir. 2009); United States v. Sturm, Ruger & Co., 84 F.3d 1, 5-6 (1st Cir. 1996); see also Solis v. Operation Mgmt. Grp. Co. et al., No. 10-1380 (1st Cir. Feb. 3, 2011) (unpublished) (affirming a district court's orders of enforcement and civil contempt, and entering judgment for the Secretary, on the ground that her administrative subpoena issued under the FLSA "honored the constitutional and statutory limits on her subpoena authority") (Addendum to this brief).[7] Since the agency has the duty in the first instance to determine coverage, it therefore follows that "a subpoena enforcement proceeding is not the proper forum in which to litigate the question." Shaw, 668 F.2d at 989. As the Eighth Circuit stated in Shaw, "in a subpoena enforcement action, the agency cannot be required to demonstrate that the very matter or entity it seeks to investigate under its statutory investigatory powers is covered by the enabling statute since the authority to investigate the existence of violations . . . include(s) the authority to investigate coverage." Id. (internal quotation marks omitted). Moreover, if WHD, after conducting a full investigation, concludes that CSG member-partners are employees, and are owed back wages under the FLSA, CSG has an adequate remedy at law to challenge that determination. See, e.g., Mobil

[7] See 10th Cir. R. 32.1(A), (B); 1st Cir. R. 36(c).

Exploration & Prod. U.S., Inc. v. Dep't of Interior, 180 F.3d 1192, 1200 (10th Cir. 1999) (anticipatory challenges not suitable in subpoena enforcement action).

CSG's argument that because it characterizes its workers as "partners" they are not "employees" covered by the FLSA fails to recognize that the Department is charged by statute to investigate and assess employee status under the FLSA. CSG's characterization of its workers as member-partners is not dispositive. See, e.g., EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 706 n.2 (7th Cir. 2002) (recognizing that an employer cannot evade statutory coverage by labeling its employees as partners). The Department cannot make the determination that CSG member-partners are "bona fide" partners exempt from the provisions of the FLSA without completing a full investigation. The FLSA specifically authorizes the Department to request any records that it "may deem necessary or appropriate to determine whether any person has violated" the FLSA or which may aid in FLSA enforcement. 29 U.S.C. 211(a).

CSG argues (Br. 30-33) that a number of cases, such as EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071 (9th Cir. 2001), support its argument that the district court should have determined whether CSG's "partners" are covered by the Act prior to enforcing the subpoena. While the Ninth Circuit in Karuk Tribe did permit a pre-enforcement challenge to an administrative subpoena, it did so on the ground that it was addressing the question of an agency's jurisdiction over the

employer; emphasized that such an inquiry is warranted only in the most extreme cases where jurisdiction is "plainly lacking"; and distinguished the jurisdictional issue from questions of statutory coverage, noting that "factual challenges based on a lack of statutory 'coverage' are clearly not permitted." See id. at 1077 (citations omitted); cf. Sidley Austin, 315 F.3d at 701. The Karuk court emphasized that the jurisdictional question in that case was particularly compelling because of the Tribe's sovereign status, noting that "[i]n this context, the prejudice from compliance is real." 260 F.3d at 1078. The court thus concluded that the jurisdictional challenge to the Equal Employment Opportunity Commission ("EEOC") on the ground that the Age Discrimination in Employment Act ("ADEA") does not apply to Indian tribes and that the Tribe had sovereign immunity from the EEOC investigation "falls into a narrow category of cases that is ripe for determination at the enforcement stage." Id. at 1077; see Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 491-92 (7th Cir. 1993).

While the Seventh Circuit in Sidley Austin declined to adopt such a clear-cut distinction between jurisdictional and coverage issues in subpoena enforcement proceedings, it confirmed that successful pre-enforcement challenges to administrative subpoenas are rare, and that the agency is generally "entitled to the information that it thinks it needs in order to be able to formulate its theory of coverage before the court is asked to choose between the [agency's] theory and that

of the subpoenaed firm." 315 F.3d at 700. The court noted that only when the requested information "is not even arguably relevant" to the agency's investigation "because it is evident at the outset that whether the agency has any business conducting the investigation depends on a pure issue of statutory interpretation, can the court resolve the issue then and there without insisting on further compliance with the subpoena." Id. (citations omitted). The Seventh Circuit concluded that because the issue, whether law firm partners were "employees" for purposes of the ADEA, "remain[ed] murky despite [the employer's] partial compliance with the subpoena," enforcement of that part of the subpoena relevant to coverage was proper "unless the additional documents the Commission is seeking are obviously irrelevant." Id. at 707; see EEOC v. Peat, Marwick, Mitchell & Co., 775 F.2d 928, 930-31 (8th Cir. 1985) (rejecting argument that the agency was required to show that the company's partners were employees under the ADEA before enforcement of the agency administrative subpoena).

This is not, however, a case where "it is plain on the basis of uncontested facts" that CSG member-partners are not employees for purposes of the FLSA. See Sidley Austin, 315 F.3d at 707. Whether an individual is an employee for purposes of the FLSA is a mixed question of fact and law. See, e.g., Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999) (citing, inter alia, Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988)), and the facts here do not

establish as a matter of law that CSG member-partners are not employees. In sum, this case does not fall within the narrow category of cases that have examined coverage in the context of a subpoena enforcement action in purely jurisdictional terms, as a matter of clearly dispositive statutory interpretation, or as a matter of law based on undisputed facts.

3. The scope of the Administrator's subpoena authority under the FLSA is tempered by certain considerations. The subject of an administrative subpoena may challenge the subpoena based on these considerations before providing the requested documents. This Court has held that to obtain judicial enforcement of an administrative subpoena, an agency must show that its inquiry is: (1) not too indefinite; (2) reasonably relevant to an investigation which the agency has authority to conduct, and (3) that all administrative prerequisites have been met. See SEC v. Blackfoot Bituminous, Inc., 622 F.2d 512, 514 (10th Cir. 1980) (citing United States v. Morton Salt Co., 338 U.S. 632 (1950)). Once these factors are met, enforcement of the administrative subpoena is proper "unless the respondent proves that the subpoena is overly broad or burdensome," or enforcement of the subpoena would constitute an abuse of the court's process, such as when the agency is acting for an improper purpose. Martin v. Gard, 811 F. Supp. 616, 620 (D. Kan. 1993) (citations omitted); see Blackfoot, 622 F.2d at 515. Mere

allegations of abuse are not sufficient to establish a substantial question. See Blackfoot, 622 F.3d at 515 (citations omitted).

CSG argues (Br. 11-12) that the district court did not fully consider these subpoena enforcement factors in its Order enforcing the Department's subpoena. However, the district court's decision explicitly adopts the findings and conclusions of the magistrate judge in his initial and subsequent Reports and Recommendations. The magistrate judge, crediting the Department's Memorandum and two Affidavits submitted in support of its Petition to Enforce the Subpoena, concluded that the Department's subpoena was not too indefinite; was reasonably relevant to the investigation; and met all administrative prerequisites. See Order (App. 000194-196); Report and Recommendation (App. 000144-149); Mem. Decision and Report and Recommendation to Deny Motion to Dismiss ("Mem. Decision") (App. 000173-75). There is no reason to believe that these criteria were not fully considered. See, e.g., Carlisle v. Conoco, Inc., 23 Fed. App'x 963, 967-68, 2001 WL 1580911, at * 2-3 (10th Cir. 2001) (appellate courts assume that the district court reviewed and considered all arguments) (citing Green v. Branson, 108 F.3d 1296, 1305 (10th Cir. 1997)) (absent evidence to the contrary, appellate courts will assume a district court properly reviewed magistrate judge report). Since the agency satisfied these "modest requirements," the district court correctly concluded that the subpoena should be enforced, see Sturm, Ruger,

847 F.3d at 24, particularly given this Court's directive that a court should "not encourage or allow an employer to turn a summary subpoena-enforcement proceeding into a mini-trial by allowing it to interpose defenses that are more properly addressed at trial." See Mem. Decision (citing Dillon Cos., 310 F.3d at 1277) (App. 000174).

CSG also argues (Br. 6-7) that the documents requested in the administrative subpoena are not reasonably relevant to the question of statutory coverage because they address hours of work, rather than employee status. As an initial matter, it is for the agency, not CSG, to determine what documents are needed to analyze coverage under the Act. Moreover, as the affidavits submitted in support of the Department's petition to enforce its subpoena explain, the Department's subpoena is not limited to documents reflecting hours of work; the subpoena requests a number of additional documents to aid the agency in investigating the member-partners' employment status not only with CSG, but with CSG's clients. See Subpoena (App. 000026); Starr Aff. ¶ 8 (App. 000031); Reed Aff. ¶ 10 (App. 000017). Furthermore, the Department's request for information need not be limited to questions of coverage. Relevancy is established "[i]f the material requested touches a matter under investigation"; in fact, "[i]t is enough that the information sought is relevant to any inquiry that the administrative agency is authorized to undertake." Gard, 811 F. Supp. at 621 (internal quotation marks

omitted); see Dillon Cos., 310 F.3d at 1274 (distinguishing the EEOC's authority to access evidence relevant to the investigation from "other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction") (internal quotation marks omitted). The Department's subpoena seeks, inter alia, documents establishing the annual dollar volume of business done, payroll records, and billing information for clients to which CSG has sent employees to work. The Department may require CSG to produce documents regarding its business associates so that it may determine if others have violated the FLSA (particularly in any instances of potential joint employment). Therefore, CSG's argument that the documents identified in the Department's subpoena are not relevant is incorrect.[8]

[8] Although CSG has produced some of the documents listed in the subpoena, it has not fully complied. Some of the documents that CSG has not yet produced, such as contracts, billing invoices, and work orders, could establish joint employment and thus are relevant to coverage. Of course, even if CSG fully complied with the subpoena, it does not automatically follow that its appeal is moot since CSG is also contesting the Secretary's authority to issue the subpoena, and therefore retains an interest in the case. See, e.g., United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 469 (2d Cir. 1996).

CONCLUSION

For the foregoing reasons, the district court's order enforcing the Secretary's subpoena should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 10th Cir. R. 28.2(C)(4), the Secretary does not believe that oral argument is necessary in this case because the issues presented herein may be resolved based on the briefs submitted.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   it contains 4,669 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: August 20, 2012

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CERTIFICATE OF VIRUS CHECK

I hereby certify that a virus check, using McAfee VirusScan Enterprise and AntiSpyware Enterprise 8.8, created on August 13, 2012, was performed on the PDF version of this brief and no viruses were found.

Date: August 20, 2012

s/ Maria Van Buren
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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that, on this 20th day of August, 2012, the Brief for the Secretary of Labor is being filed electronically with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the Court's appellate CM/ECF system and that counsel of record listed below are registered CM/ECF users and that service to them will be accomplished by the Court's appellate CM/ECF system.

I further certify that I have complied with the privacy redaction requirements and that seven paper copies of the brief required to be submitted to the clerk's office are exact copies of the CM/ECF filing.

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