IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EDWARD C. HUGLER, *Acting Secretary of Labor, United States Department of Labor*,	:	CIVIL ACTION NO. 1:16-CV-3845-LMM-JSA
Petitioner,	:	
v.	:	
JASPER CONTRACTORS, INC.,	:	**FINAL REPORT AND RECOMMENDATION ON A MOTION FOR CONTEMPT**
Respondent.	:	

The above-captioned action is before the Court on the Secretary of Labor's Motion for Contempt [16]. The Petitioner, the Secretary of Labor ("Petitioner" or "Secretary"), requests that the Court issue an Order holding the Respondent, Jasper Contractors, Inc. ("Respondent" or "Jasper"), in civil contempt based on its failure to comply with an Order of the Court requiring it to respond to an administrative subpoena issued by the Secretary. For the reasons set forth herein, the undersigned **RECOMMENDS** that the Petitioner's Motion for Contempt [16] be **GRANTED IN PART AND DENIED IN PART**.

I. CONTEMPT PROCEDURE BEFORE A U.S. MAGISTRATE JUDGE

Under the Federal Magistrates Act, United States Magistrate Judges have limited power to exercise contempt authority. *See* 28 U.S.C. § 636(e). Magistrate Judges are authorized to exercise contempt authority in certain limited circumstances, including summary criminal contempt authority, which may be imposed for conduct that occurred "in the magistrate judge's presence so as to obstruct the administration of justice," as well as criminal contempt and civil contempt authority in misdemeanor cases and in cases in which the magistrate judge presides with the consent of the parties. 28 U.S.C. §§ 636(e)(2), (3), (4). In civil cases in which the parties have not consented to the jurisdiction of the Magistrate Judge, if a party commits an act that constitutes a civil contempt, the Federal Magistrates Act requires a Magistrate Judge to certify the facts to a District Judge:

> [T]he magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

28 U.S.C. § 636(e)(6); *see also Smith v. Pefanis*, 652 F. Supp. 2d 1308, 1315-16 (N.D. Ga. 2009) (Forrester, J.).

In cases such as the instant case, in which the Magistrate Judge is acting under the authority granted in 28 U.S.C. § 636(b), that procedure sets forth three scenarios that require the magistrate judge to certify facts to the district judge: (i) the alleged act constitutes a serious criminal contempt committed in the presence of the magistrate judge; (ii) the alleged act constitutes a criminal contempt but occurred outside the presence of the magistrate judge; and (iii) the act constitutes a civil contempt. 28 U.S.C. § 636(e)(6)(B). Certification of the facts is thus required under this section of the Act only when the Magistrate Judge is satisfied that one of the three enumerated scenarios is present.

Under this certification process, upon a motion for civil contempt, a Magistrate Judge may conduct a hearing, but the magistrate judge "functions only to 'certify the facts'" and does not have the authority to issue an order of contempt. *Church v. Steller*, 35 F. Supp. 2d 215, 217 (N.D.N.Y. 1999) (citing *Litton Sys., Inc. v. AT & T*, 700 F.2d 785, 827 (2d Cir.1983)); *Gomez v. Scoma's, Inc.*, No. C–94–4452, 1996 WL 723082, at *3 (N.D. Cal. 1996) (holding that a magistrate judge's duty "is simply to investigate whether further contempt proceedings are warranted, not to issue a

contempt order"); *see also In re Kitterman*, 696 F. Supp. 1366, 1370 (D. Nev. 1988); *NLFC, Inc. v. Devcom Mid–America, Inc.*, No. 93C0609, 1994 WL 188478, at *6 (N.D. Ill. May 11, 1994). In certifying the facts under Section 636(e), the magistrate judge must "determine whether the moving party can adduce sufficient evidence to establish a *prima facie* case of contempt." *Church*, 35 F. Supp. 2d at 217 (citing *Proctor v. State Gov't of N.C.*, 830 F.2d 514, 521 (4th Cir. 1987)). The accepted procedure is for the magistrate judge to certify the facts supporting a finding of contempt within a Report and Recommendation issued under 28 U.S.C. § 636(b)(1)(B). *See NLRB v. Steele*, No. 07-CV-50712, 2008 WL 474077, at *3 (E.D. Mich. Feb. 19, 2008) (citing *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041,1045 (6th Cir.1996)).[1]

[1] If live testimony was presented to and considered by the Magistrate Judge, the District Judge must conduct a *de novo* hearing to hear from those same witnesses to the extent issues of credibility are to be made. *See Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 907-08 (3d Cir. 1992) (holding that it was error for the district court not to conduct a *de novo* hearing on the evidence after the magistrate judge issued a certification of facts in support of contempt). Here, however, the factual record presented to the undersigned consisted solely of declaration testimony, transcripts of depositions taken outside of the undersigned's presence, documents attached to exhibits and briefs, and proffers of fact by counsel. In this case, therefore, a *de novo* review of the factual record would not require re-hearing any testimony from any fact witnesses, but rather simply reviewing the same materials that the undersigned reviewed.

II. CERTIFICATIONS OF FACT

Pursuant to the procedure set forth in 28 U.S.C. § 636(e)(6), the undersigned Magistrate Judge **CERTIFIES** the following facts in support of a finding of civil contempt against the Respondents:

1. This case arises out of a Subpoena Duces Tecum issued by the U.S. Department of Labor to Respondent, a roofing company, on August 16, 2016, demanding production of 47 separate documents or categories of documents by August 31, 2016. *See* Subpoena [1-3].

2. Specifically, the Secretary states that it has investigated Respondent and observed workplace safety violations at least eight (8) times in the preceding two years, all resulting from anonymous complaints of roofers working without fall protection. [1-1] at 3. Those cases were all settled and final orders were entered with the Occupational Safety and Health Administration ("OSHA"). *Id.*

3. On August 2 and 5, 2016, OSHA initiated follow-up inspections of Jasper worksites in Florida, and subsequently issued the Subpoena as part of its followup investigation. *Id.* The Secretary brought the Motion to Enforce alleging that Respondent did not fully comply with the Subpoena.

The Court's Original Order of Enforcement and the Resulting December 2016 Production

4. The Court convened a hearing on October 28, 2016, during which it issued detailed rulings from the bench on each of the disputed requests for production, and also memorialized its rulings in a brief written order. *See* Transcript [10], Order [11]. The Court granted the motion in substantial part, and ordered compliance with most of the Petitioner's requests. As to some requests, however, the Court upheld Respondent's objections on grounds of undue burden and/or permitted a narrowed construction of the requests. *See* Order [11] at 8-9. The Court ordered Respondent to provide the documents requested in the Subpoena, as modified by the Court's rulings, by December 1, 2016. *Id.* The Court further ordered that, in the event Respondent contended that it produced all of the responsive documents in its possession, control or custody with respect to any of the specific categories of documents requested in the subpoenas, it must provide a certification to that effect to Petitioner by December 1, 2016. *Id.*

5. Respondent produced several thousand documents by December 1, 2016, and also stated that it had thereby produced the totality of responsive documents. [16-3]. Respondent, however, continued to submit more documents and provide further responses in the week that followed. *See* [16-4][16-6].

6. The nearly 20,000 pages of documents produced from November 30, 2016 through December 6, 2016 were not produced with any clear organization, either with an indication of what documents were responsive to what requests, or in a form that showed what and/or whose files the documents came from. For example, thousands of pages of roofing installation reports were strewn throughout the production in various places, multiple copies of the same documents were produced, and other documents were spliced in between other multi-page documents. *See* Torres-Gilot Decl. [27-1] ¶ 7.

7. The in-house attorney who prepared the production (Renee Van Tassell) did not deny that the materials were produced in a disorganized manner, but rather testified that this disorganization was not intentional. For example:

> As I told you earlier, with getting everything organized in order to get it into the right spot, I had a temp doing filing, I had an assistant before that doing filing, and neither one of them were super smart. And I'm not saying that to be ugly to them. They weren't being asked to do a whole lot. They were young and they were doing what they were told and they were filing these things. And they don't know the business, they don't know those types of things and so when they filed them, did a piece of paper stick together. I am certain that I did not tell them to put my dentist bill in the middle of an OSHA file. It just happened.

Van Tassell Dep. [28] at 76-77.

When asked specifically to explain the manner in which roofing inspection reports were produced in various places throughout the production, Ms. Van Tassell explained:

> A. The inspection forms I believe took up three boxes, and we were trying to fill these boxes as much as we could. So the inspection forms were sitting stacked on top of the other. And then there's a whole long section on the side because these boxes were bigger than – I don't know, the shape of them was different. And so when things were being copied, they were just filling the boxes. So one person was printing, one person was copying. And once that section of it would get filled, I was concerned that they were going to all shift so I'm like, well, let's just stuff papers on this side so that way nothing will shift and it will all be together.....
>
> Q. Did somebody actually look at the box so you knew what was the order in which things were in the box as opposed to just knowing generally like I pulled all this stuff and it's somewhere in these boxes?
>
> A. We just did the best we could.

Id. at 79-80.

8. Also, the production included thousands of pages outside the time frame of or otherwise unresponsive to the Subpoena, including over 3,000 pages of receipts and bills from the time period 2013-2015, even though the Subpoena only asked for documents from January 1, 2016 through the date of the Subpoena. Torres-Gilot Decl. [27-1] ¶ 8.

The Motion for Contempt and Resulting February 2017 Order

9. Alleging that Respondent's production continued to fail to produce all responsive documents, and was presented in a manner deliberately intended to obfuscate and delay the investigation, the Secretary filed the instant Motion for Contempt [16] on January 23, 2017. The Court convened a hearing on February 15, 2017, and issued a written order on February 16. The Court deferred issuing any recommendations or rulings with regard to the Motion for Contempt. Instead, the Court ordered Respondent to provide a corporate representative to be deposed as to its search for documents, how documents were organized in the ordinary course of business, and how materials responsive to the Subpoena were gathered and produced. [20] at 1-2.[2] The Court also ordered Respondent to either specifically delineate what documents were responsive to what request or to re-produce its documents in the manner as they were kept in the ordinary course of business. As the Court explained and ordered orally at the hearing, producing records as kept in the ordinary course of business, includes, at a minimum, providing enough surrounding information to show what files those records came from and from what custodian. Such information had not been provided in the original production.

[2] The result was the Van Tassel deposition, referred to earlier, which is included in the docket as entry 28.

10. The Court scheduled further briefing in the event that Petitioner continued to assert an entitlement to contempt after taking testimony as to Respondent's document production, and after receiving any corrections in Respondent's production. *Id.*

11. Respondent produced or re-produced approximately 3,200 pages of records on February 27, 2017, and this time did so with bates labeling and with specific indications of the request to which the documents were responsive. Some of these documents were re-productions of documents previously produced, but some were new. Torres-Gilot Decl. [27-1] ¶ 6.

12. Some of the new documents resulted from electronic searches that Respondent had its IT staff undertake on its systems for particular search terms, including "eye" and "fall." Van Tassel Dep. [28] at 99-100. The prior production, by contrast, was the result of a manual review for documents that did not include such electronic searches. *Id.*

13. On February 27, 2017, Respondent provided a 40-page letter from counsel describing and organizing the approximately 3,200 documents that were being produced and/or reproduced on that date. *See* [27-3].

14. Respondent apparently did not provide information to better organize the other approximately 20,000 pages that were previously produced or identify what documents had been produced to what requests. Indeed, Respondent had not retained copies of its December 2016 productions, and therefore had no record of what it actually produced or in what order. *See* Resp. Br. [33] at 4-5. Therefore, Respondent requested that Petitioner send back a copy of the production for purposes of allowing Respondent to provide an index or other information to comply with the Court's February 16 Order. Because of delays in the transmission of those documents back to Respondent, Respondent did not provide any such organizational information by February 27, 2017. Respondent states that it has since received the copies necessary, and has "cured" its failure to provide an organizational index by February 27, 2017, by applying bates numbering to the original production and by preparing a detailed 37-page index of the documents. *See* Resp. Br. [33] at 20 n. 4; Ex. B [33-2].

Continued Allegations of Deficiencies

15. The Petitioner continues to assert an entitlement to contempt sanctions, and filed its supplemental brief on March 17, 2017 [27], relying on a factual declaration from its investigator, Ms. Torres-Gilot. Respondent replied on March 31, 2017 [29][33], citing among other things deposition testimony from Ms. Van Tassel.

The Court held oral argument on April 11, 2017 [32]. At this hearing, counsel for both sides presented argument but neither party introduced any further testimony, choosing instead to rely on the declarations and deposition testimony cited in their briefs.

16. Even after the continuations of productions and re-productions and furnishment of various additional information, Petitioner alleges several specific areas in which Respondent's production remains incomplete and deficient, as explained individually below.

McCary Contract

17. First, Petitioner complains about Respondent's continued non-production of a contract with John McCary, General Contractor, Inc., d/b/a Five Star Roofing, which was requested in request no. 5 of the Subpoena, *see* [1-3] at 3. At first, on December 13, 2016, Respondent represented that it had produced the relevant subcontract agreement and associated documents. *See* [16-6] at 2. However, on March 10, 2017, after Petitioner could not locate any such agreement, Respondent indicated instead that:

> Jasper Contractors does not have a fully executed copy of its Subcontract Agreement with John McCary General Contractor, Inc. d/b/a Five Star Roofing. Jasper Contractors has not produced a fully executed copy of this Subcontract Agreement because they have been unable to find the document. If the Secretary contends that a copy of this fully executed subcontract agreement is in the production, please indicate the bates

> number for same. Jasper Contractors has produced Breach Notices, Insurance Certificates, and payment information for this subcontractor, but the Respondent does not have an executed copy of the Subcontract Agreement.

[27-4] at 2. In other words, Respondent does not deny that such an agreement was executed, but rather denies that it possesses a copy of an "executed copy" of it.

18. Petitioner introduces declaration testimony from an investigator stating that Respondent's production contained no unexecuted copies of the agreement either. *See* [27-1] ¶ 13. Respondent does not point to any evidence contradicting that statement or asserting that it lacks possession of an unsigned copy of the agreement.

19. Notably, despite claiming that it lacks a copy of the agreement to produce to Petitioner, Respondent produced documents showing that it gave formal legal notice to McCary alleging a potential breach of that contract, and in that notice quoted the contract itself (which Respondent now claims to lack a copy of) at length. *See* [27-2] at 59-60. This breach notice was sent on August 5, 2016, at the time of the OSHA inspections that gave rise to the Subpoena, and just shortly before the Subpoena itself was issued.

PEO Contracts

20. Another category of information about which Petitioner claims Respondent has not adequately responded relates to agreements or communications

with Professional Employment Organizations ("PEOs") or similar organizations since January 1, 2016, which was requested in Subpoena Request Nos. 16, 37, and 38, *see* [1-3] at 4, 6. On December 13, 2016, Respondent represented that its December production included all responsive documents within its possession, including "correspondence with Professional Employment Organizations and the contracts for services," and all emails with PEOs. *See* [16-6] at 5, 10. Respondent's February 27, 2017 letter stated, in response to these subpoena requests, that all "emails" with PEOs have been provided, but did not reference contracts. *See* [27-3] at 29, 39.

21. Among the contracts that Respondent had with a PEO during this time frame was with Howard Leasing. Petitioner, in fact, has obtained a copy of this agreement from Howard Leasing during a previous inspection. *See* Torres-Gilot Decl. [27-1] ¶ 15. Petitioner has introduced evidence that Respondent did not provide a copy of this agreement, despite stating on December 13, 2016 that it provided "the contracts for services" with PEOs. Respondent has not produced testimony denying that it has such a contract with Howard Leasing or that it has failed to produce it.[3] Rather,

[3] Respondent in its latest brief states, through counsel, that:

> upon closer inspection, it turns out that Jasper was wrong: this agreement was indeed produced in the first raft of documents. This is confirmed by the Secretary's Bates-stamp number on the 1-page document, which was an exhibit to some of the old deposition transcripts Ms. Van Tassell produced

Respondent stated in its March 10, 2017 letter that, much like its contract with McCary/ Five Star Roofing, "Jasper Contractors does not have a copy of its contract with Howard Leasing, Inc." [27-4] at 3.

22. Petitioner has produced evidence, and Respondent does not refute, that Respondent's production of email communications with PEOs consists of a single email communication, which was not produced until March 10, 2017. *See* Torres-Gilot Decl. [27-1] ¶ 15.

Employee Lists

23. Another area about which Petitioner complains is Respondent's production of employee lists and contact information. Respondent represents that it has produced the employee lists that it has maintained in the ordinary course of its business, but Petitioner has introduced evidence showing that Respondent's employee lists differ from certain lists obtained directly from the PEOs utilized by Respondent

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> and was attached by the Secretary as an exhibit to a March 7, 2016 deposition. (Bates stamped no. JRAS 003381). In response to the Secretary's request, Jasper simply produced a copy of the deposition transcript, which the Secretary surely already had: thus the Secretary had in his possession the very document he continues to insist that Jasper is withholding, having received that document from Jasper in response to his request.

Resp. Br. [33] at 14.

to supply labor in 2016 (Howard Leasing and Southeast Personnel Leasing). *See* Torres-Gilot Decl. [27-1] ¶ 11. According to the testimony from Petitioner's investigator:

> In the [December 2016] 20,000 page production, Jasper produced an employee list for 2016; however, this list is not consistent with the employee lists I obtained directly from the professional employment organizations (PEOs)—Howard Leasing and Southeast Personnel Leasing utilized by Jasper in 2016.The employee list I received from Howard Leasing does not have all the same roofers on it as on the Jasper list and the dates of employment do not match. The Howard Leasing list has terminations through July 2016 and Jasper's list had terminations only through April 2016. Jasper produced yet another employee list in the February 27, 2017 production that appears to be similar to the Southeast Personnel Leasing list for the time period of mostly July 2016 through February 2017. Therefore, there is a significant gap in information where the termination of employees is not accounted for between January and July 2016. On March 10, 2017, Jasper provided its employee list for 2016 from Howard Leasing.

[27-1] ¶ 11.

24. Respondent provides no cite to any testimony to explain why its employee list differs from that of the PEOs that it uses, or why Respondent's list only shows terminations through April 2016. Respondent's legal brief states, without citing evidence, that "Beginning February 2016, Jasper changed its business model and transitioned away from employing roofers: by April 22, 2016, the transition was mostly complete." Resp. Br. [33] at 15.

Health and Safety Inspection Reports

25. A major category of Subpoena document requests concerned safety and health inspection reports, covered by request nos. 25-27. *See* [1-3]. Petitioner's investigator attests that Respondent's original 20,000 page production contained no safety reports from February 2016, July 2016, August 2016 or thereafter, and only some reports from January 2016. [27-1] ¶ 12.

26. With regard to the non-production of safety reports generally during this period, Respondent's counsel represented at the February 15, 2017 hearing that the reason for "the lack of January 2016 through March 2016 inspection reports is simply due to the fact that they were not doing a significant number of roofs at that time." Tr. [24] at 13.

27. However, the facts in the record lead the undersigned to conclude that there were safety inspections conducted and reports created during this period, particularly during January and February 2016, which have not been produced in response to this subpoena. Specifically, Ms. Torres-Gilot, Petitioner's investigator, submitted a sworn declaration stating that she had received safety reports from Respondent in prior inspections from January through February 8, 2016, but which were not produced in response to this subpoena. [27-1] ¶ 12. Further, in December

2015, Respondent and Petitioner had entered into a settlement agreement that mandated that Respondent would conduct and document a minimum of five site safety inspections per week. *Id.* In further contradiction to counsel's unsworn representation at the February 15 hearing as to the lack of roofing activity during the first quarter of 2016, Ms. Torres-Gilot testified that:

> the documents such as weekly checks to contractors and summaries of payments to contractors is consistent throughout 2015 and 2016 and shows that Jasper's business is and has been sufficiently significant to be performing and documenting weekly safety inspections. This is also confirmed by emails from Jasper employee Arielle Dysert to owner Brian Wedding and others in 2016, produced on February 27, 2017, showing that Jasper was paying out contractors on average between $61,000 - $106,000 per week between February 25, 2016 and April 13, 2016.

Id.

28. Respondent has pointed to no sworn testimony or other evidence to refute that additional safety reports were created during the January and February 2016 timeframe but were not produced in this case. In the most recent hearing, Respondent's counsel, citing no testimony from Ms. Van Tassel or any other witness, simply stated that Respondent looked for but cannot locate the February 2016 safety reports. Notably, counsel did not continue to assert in the face of Ms. Torres-Gilot's testimony that the lack of records was attributable to a lack of roofing activity, as was previously asserted by prior counsel in the February hearing.

Emails and Texts

29. Petitioner also complains that Respondent has produced only a handful of emails or text messages among its managerial staff regarding compliance with safety policies and/or safety or OSHA inspections in 2016 (as covered in Requests Nos. 33-36, 46-47), other than certain generic, automatically-generated reminder alerts. In particular, Petitioner complains that Respondent produced no emails between its CEO, Brian Wedding, and in-house lawyer, Ms. Van Tassell, about safety. *See* Torres-Gilot Decl. [27-1] ¶ 14.

30. Petitioner has shown that Respondent's managerial staff in previous years (outside the time period covered by this Subpoena) has used email and/or text communication to discuss safety and inspections. For example, during an August 2014 inspection, an OSHA investigator observed a superintendent texting Ms. Van Tassell that "OSHA is here." Torres-Gilot Decl. [27-1] ¶ 9. Another Safety Manager previously informed investigators that, in connection with a 2015 inspection, Ms. Van Tassell advised him not to send e-mails or pictures because they could be discoverable in any OSHA action, and to burn or throw away inspection papers that he had filled out earlier in the day showing that the roofers were not in compliance with OSHA's

safety regulations. *Id.* Respondent's brief does not cite to any testimony refuting these assertions.

31. Ms. Van Tassell specifically testified that she searched for and confirmed that there were no text messages within the relevant time to produce. Van Tassell Dep. [28] at 29-31.

32. Petitioner points to testimony from Ms. Van Tassell explaining her steps in searching for responsive text messages. Specifically, she called superintendents and assistant superintendents to ask them if they had safety-related text messages on their phones. All of them responded that they had no such messages during the telephone call, which means that none of them felt the need to get off their phones to conduct a search before answering the question. *See* Van Tassell Dep. [28] at 48-49, 51.

33. Van Tassell also stated that she asked these managers to send her an email confirming the lack of text messages, that she received such confirming emails, and that such confirming emails were included in the production. *Id.* at 49-50.

34. However, as Ms. Torres-Gilot explains and as Respondent fails to refute with reference to any testimony, only one such confirming email has been produced, from Superintendent James Allen on December 1, 2016. *See* Torres-Gilot Dep. [27-1] ¶ 10.

35. It is not clear to the Court based on this record when the request for emails or text messages was made to Jasper employees or if or when a preservation instruction was issued. On this record, based in particular on the solitary confirming email from Allen to Van Tassell on December 1, the Court can only conclude that the request for email or text records occurred shortly before the December 1 production deadline.

36. Respondent's counsel at the February 15 hearing represented that "a preservation instruction or request [was] made that was substantially earlier than December 1." Tr. [24] at 17. But Respondent has cited no evidence in support of this statement and, in fact, Ms. Van Tassell testified that she does not recall when or how many times she called Jasper employees to notify them of the request for text and email messages, or to instruct them as to any duty to preserve. Van Tassell Dep. [28] at 27-29. Again, Petitioner notes that the only email between a superintendent and Ms. Van Tassell about the request for communications relating to the Subpoena was dated December 1, 2016.

37. Counsel at the April 11, 2017 hearing again specifically represented that requests for emails and texts were made around the time of the Court's original order to enforce, that is, October 28, 2016. But counsel offered no evidence in support of

this assertion and the undersigned finds no support in any portions of the Van Tassell deposition that have been cited by either party. Therefore, the undersigned concludes that the calls to superintendents and assistant superintendents and other efforts to gather potentially responsive emails and texts were made on or shortly prior to the production deadline of December 1.

38. The parties did not cite testimony discussing how any search for responsive emails (as opposed to text messages) was conducted prior to the December 2016 production. Ms. Van Tassell testified that while the original December production was largely gathered manually, they took additional steps in connection with the February 2017 production "So I could just sit here on the record and say, this is it, so I could just say we did the best we could." Van Tassell Dep. [28] at 103-104. Specifically, Respondent instructed an IT staff employee to conduct electronic searches via search terms, including "eye" and "fall." *Id.* This effort resulted in a substantial number of additional "hits," most of which had nothing to do with safety or other relevant issues. *Id.* Ms. Van Tassell reviewed the "hits" and determined what materials were responsive or otherwise should be produced. *Id.* at 104-113. Some of these documents were produced "in an overabundance of caution in order to prove we have done everything." *Id.* at 42.

39. Petitioner has pointed to at least one email document that appears to exist but which has not been produced, that is, an attachment to an email that discusses the purchase of safety-related equipment. *See* Torres-Gilot Decl. [27] ¶ 14, Ex. 9.

Records of Purchases of Safety Equipment

40. Subpoena Request Nos. 42-45 requested documents pertaining to Respondent's purchase or provision of eye or fall protection equipment for employees or subcontractor employees after January 1, 2016. *See* Subpoena [1-3] at 6.

41. Respondent's response to these requests was to order copies of its credit card billing statements from Lowe's and Home Depot, which Ms. Van Tassell explained were the exclusive vendors from which Respondent purchased eye or fall protection equipment (along with many other materials). *See* Van Tassell Dep. [28] at 116, 118-123. Respondent then produced these statements to Petitioner, assuming that all of Respondent's safety-related equipment purchases were necessarily reflected somewhere in those documents. *Id*.

42. Ms. Van Tassell in her deposition explained that Respondent maintains accounting records that keep track of job-related purchases such as for eye and fall protection. She explained that such purchases are accounted for in the category of "small equipment," and that reports can be generated from the accounting system to

document all of these purchases. *See* Van Tassell Dep. [28] at 114, 121. When asked clarifying questions by the Court in the April 11 hearing as to the information maintained in this system, Respondent's counsel (after consulting with Ms. Van Tassell) confirmed that the system maintains records of individual purchases of small equipment on a job-by-job basis, including all safety-related equipment. *See* Transcript, April 11, 2017 Hearing at 39-42. But counsel explained that these business records were not gathered and produced because the time and labor required to pull these accounting records on a job-by-job basis was significantly greater than simply requesting the statements from the vendors, that is Lowe's and Home Depot, and then producing those statements. *Id.*

43. However, the thousands of pages that Respondent produced from Lowe's and Home Depot related to purchases in 2013-2015 and not during the relevant period, that is, January through August 15, 2016. *See* Torres-Gilot Decl. [27]-1] ¶ 8.

44. The records from Home Depot and Lowe's also do not specifically identify what items are safety-related and what are not. The statements identify items purchased by an identifier ("SKU") number and a brief description. *See* Torres-Gilot Decl., Ex. 1 [27-2].

45. Respondent in its latest brief argues, with respect to Petitioner's statement that no 2016 receipts were produced, that "a cursory review of those documents demonstrates that the Secretary is wrong again and invoices from 2016 were, in fact, produced." Resp. Br. [33] at 18. Respondent, in support, cites Exhibit F to its brief [33-6]. The Court, however, rejects the conclusions that Respondent draws from this document. The exhibit is a 52-page Lowe's statement. To be sure, it is dated January 2, 2016, and in that sense technically contains a 2016 date (although barely). But it appears that the only purchases reflected in this statement were actually made in 2015. Thus, it does not appear that this document is responsive to a request calling for information about purchases and provision of safety equipment in 2016, and does not materially rebut Ms. Torres-Gilot's testimony as to Respondent's failure to produce records of 2016 purchases.

46. Respondent's brief also argues that the records produced detail the specific safety items purchased, referring specifically to Exhibit G [33-6]. Respondent, however, supplies no testimony to explain Exhibit G. A bare review of this document without explanation suggests that it is simply a print-out of information available for purchase online from Lowe's, and does not itself reflect or evidence any actual purchases by Respondent during the relevant period. Indeed, the date reflected on this

printout is March 28, 2017, shortly before the Respondent's filing date for its brief.

III. RECOMMENDATIONS ON PETITIONER'S MOTION FOR CONTEMPT

"A party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *S.E.C. v. First Fin. Group of Texas, Inc.*, 659 F.2d 660, 669 (5th Cir. 1981). Thus, civil contempt occurs when a party disobeys a specific and definite court order by failing to take all reasonable steps within that party's power to comply with the order. *See In re Dual–Deck Video Cassette Recorder Antitrust*, 10 F.3d 693, 695 (9th Cir. 1993). Accordingly, in order to establish that the Respondent has committed civil contempt, the Secretary must prove: (1) the existence of a lawful order and (2) a violation of that order. *See United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 899 F.2d 143, 146 (2d Cir. 1990) ("A federal court may punish contempt of a lawful order, whether the order issues directly from the court or from a consent decree agreed to by the parties."); *see also Church v. Steller*, 35 F. Supp. 2d 215, 219 (N.D.N.Y. 1999).

District courts have "wide latitude in determining whether there has been contemptuous defiance of its order." *Hook v. Ariz. Dep't of Corr.*, 107 F.3d 1397,

1403 (9th Cir.1997). There is no requirement that the contempt be "willful," nor is there any "good faith" exception to the requirement of obedience to a court order. *In re Dual–Deck*, 10 F.3d at 695 (quoting *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987)); *see also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd.*, 885 F.2d 1, 5 (2d Cir. 1989); *Church*, 35 F. Supp. 2d at 219. The party moving for a finding of civil contempt, however, must demonstrate the act of contempt by clear and convincing evidence. *See Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002); *McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir. 2000); *see also Glover v. Johnson*, 138 F.3d 229, 244 (6th Cir. 1998); *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995)*; Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982). When it has been established by clear and convincing evidence that a party has violated a court order, the burden shifts to that party to show an inability to comply. *United States v. Rylander*, 460 U.S. 752, 757 (1983).

Here, the parties do not dispute that the Court's oral orders at the October 28, 2016 hearing and subsequent summary written order of November 3, 2016 were valid, lawful orders enforcing the subpoena. The parties also do not dispute the scope of the

Court's enforcement orders, and specifically that the Court ordered production of the various documents and categories of documents at issue in the Motion for Contempt. The main issue that is hotly disputed by the parties is whether Respondent's non-production of various records that Petitioner believes to exist evidences contempt of the Court's orders. Respondent argues that it has engaged in a reasonable search for and has produced the material gathered in this reasonable search within its possession, custody or control. To the extent emails or other documents are not included in this production, Respondent asserts that such documents simply do not exist or have not been located in its reasonable search and that it is therefore not in violation of the Court's orders.

Several factors have made this a particularly difficult and laborious dispute to slog through, including evolving positions articulated over time, principally but not exclusively by Respondent, and a tendency by both parties to allege or represent facts in briefs without citation to evidence.[4] It is evident that Respondent, at a minimum,

[4] Indeed, the Court found that it could not rule on the Motion for Contempt as originally presented, because Petitioner did not rely on citations to testimony or admissible evidence to support its allegations. While Petitioner in its supplemental briefing now includes a Declaration from Ms. Torres-Gilot and cites from the deposition of Ms. Van Tassell, Respondent's brief remains much more sparse with regard to its reliance on actual testimony or evidence despite the Court's indication that it intended to consider this motion on the basis of evidence and not attorney representations.

has a deficient record-keeping system, and engaged in a somewhat cavalier approach to searching for and/or producing responsive material in this case, and in offering clear and reliable explanations for what it did and when. Nevertheless, Petitioner has asked for the serious remedy of *contempt*, including a request for actual incarceration of company officials. In that regard, the Court's difficult task is to identify if and to what extent Petitioner has proven, by the high standard of clear and convincing evidence, that Respondent has actually violated the Court's orders, by failing to produce responsive documents within its possession, custody or control that would have been gathered in a reasonable search, and that Petitioner has suffered sufficient prejudice to warrant the remedies it seeks.

The Court finds that Petitioner's motion meets this standard of proof in certain, but not all, respects, as explained in detail below.

A. Violations Demonstrated by Petitioner

First, the certified facts stated above clearly show, at a minimum, that Respondent maintains records of purchases of safety-related and other small equipment that were not gathered, reviewed, and produced in response to Subpoena Request Nos. 42-45. Respondent states, through the representations of counsel and through Ms. Van Tassell's deposition testimony, that obtaining this information

through its job-by-job accounting records would be significantly burdensome. But this particular burdensomeness objection was not articulated to the Court in the context of the original motion to enforce, much less included in the Court's general order to gather and produce these documents.[5]

Moreover, Respondent's counsel previously represented to the Court that "the lack of January 2016 through March 2016 inspection reports is simply due to the fact that [Respondent was] not doing a significant number of roofs at that time." Tr. [24] at 13. That Respondent supposedly was engaged in few jobs during nearly half of the responsive time frame would call into question any claim that it would be too burdensome to go through job-by-job accounting ledgers to print out records of purchases.

Respondent's approach to Request Nos. 42-45 was instead to order copies of its account statements from Lowe's and Home Depot, and to produce those materials

[5] The Court at the October 28 hearing ruled simply that Respondent was obliged to produce records sufficient to show the specific purchases of fall and eye protection equipment during the relevant period, and was not required to otherwise produce "any and all" such records. *See* Tr. [10] at 18-19. The Court gave the example of an accounting ledger or other summary document that would reveal the purchase of relevant devices, which could be produced in satisfaction of the request if it revealed the necessary information, without also having to separately produce all related documentation of those purchases such as receipts, invoices, account statements, etc. *Id.*

to Petitioner instead of its own purchasing records. The Court does not necessarily disagree that obtaining and producing such third party records could theoretically suffice under the Court's order, without resort to Respondent's more complicated accounting system, if those account statements revealed the same transactions with the same (or more) information that would be available from Respondent's own records. After all, the Court only ordered Respondent to produce documents *sufficient to show* its safety purchases, not *any and all* documents relating in any way to any of those purchases. *See* Tr. [10] at 18-19.

Respondent's resort to these third-party records here, however, is a prime example of its cavalier approach to this document production, which resulted in a clearly proven violation of the Court's order. Petitioner has submitted testimony, not effectively rebutted by Respondent, that none of the Lowe's or Home Depot statements actually relate to purchases during the responsive period at all. Thus, Respondent chose not to produce its own accounting records, kept in the ordinary course of its own business, that would have been responsive to these requests, in favor of receipts obtained from a third party relating solely to irrelevant time periods. While Respondent had no particular obligation to reach out and obtain records in the hands of third parties, it was obliged to produce responsive records within its own

possession, custody and control. To the extent that Respondent wished to produce third party records in lieu of its own redundant business records, it clearly was obliged to produce records relating to *the pertinent time period*. Respondent failed either to obtain responsive documents from Home Depot or Lowe's or produce its own records kept in the ordinary course of its business. This is a clear violation, which has delayed the progress of this investigation, in which these documents were initially demanded by *August 31, 2016*, and specifically ordered to be produced by the Court by *December 1, 2016.*

Second, the Court concludes that Respondent has also failed to produce health and safety reports that once existed and must be presumed, absent some explanation, to still exist or at least to have existed as of the time of the subpoena. Ms. Torres-Gilot testified that Respondent's production omitted specific reports in January and February 2016 that she knows to exist, because she has seen those reports previously in other inspections. Indeed, Ms. Torres-Gilot testified that no reports for the entire month of February were produced at all, which is a gap as to which Respondent has cited no testimony from Ms. Van Tassell or otherwise to explain.

Instead, Respondent has proffered facts through counsel. But counsel's original explanation, that "the lack of January 2016 through March 2016 inspection reports is

simply due to the fact that [Respondent was] not doing a significant number of roofs at that time," Tr. [24] at 13, has been refuted by Petitioner. Ms. Torres-Gilot specifically testified that (a) Respondent was obliged by settlement agreement to conduct and document at least five inspections per week, and (b) financial records produced by Respondent show that its level of roofing business was generally consistent throughout 2015 and 2016. Respondent offers no evidence in the face of this showing to support the assertion that "the lack of January 2016 through March 2016 inspection reports is simply due to the fact that [Respondent was] not doing a significant number of roofs at that time," Tr. [24] at 13.

Respondent now instead reports, again only through proffers by counsel, that it simply cannot find the missing inspection reports in January and February. But in the face of Petitioner's strong showing that specific responsive documents likely were created but were not produced, this unsworn and vague response from counsel is not sufficient to demonstrate compliance. Thus, the Court must find that Petitioner has demonstrated a *prima facie* case of contempt with regard to the non-production of

these safety reports, which case has not been rebutted by Respondent.[6] The Court therefore finds a violation of its orders of enforcement.

Third, Respondent has not produced any copy of its contract with McCary / Five Star Roofing, which Petitioner specifically requested back on August 15. Respondent in response offers the sworn statement of Ms. Van Tassell, that "Jasper Contractors does not have a fully executed copy of its Subcontract Agreement with John McCray General Contractor, Inc., d/b/a Five Star Roofing." [33-3] at 2. At the outset, this statement yet again contradicts earlier representations by counsel, who

[6] Petitioner also alleged that safety reports were not produced from July and August 2016 "and thereafter." Pet. Br. [27] at 11. The reference to "and thereafter" is unclear, because the Subpoena was dated August 15, 2016 and only requested documents "to the present," *i.e.*, until August 15, 2016. *See* [1-3] at 6. The record regarding Respondent's compliance for July and August is also insufficient to establish a violation. Indeed, this is in an instance in which it has been Petitioner which has expressed evolving and differing positions over time. While Petitioner's March 17 brief states that no reports from July and August 2016 were produced, Pet. Br. [27] at 11, its January 23 brief states that "[i]n June 2016, Respondent appears to have switched to a mobile device application through which its workers complete and upload inspection reports and hundreds of those reports beginning [in] June 2016 have been produced." [16-1] at 11. Ms. Van Tassell specifically testified to this switch in format that occurred in or around June 2016. *See* Van Tassell Dep. [28] at 87-88, 91-94. Respondent represents that it has produced the electronic forms in July and August and that Petitioner's reference to missing forms in that time period relates to confusion over the change in form. Particularly in light of Petitioner's differing positions over time on this point, the Court is in no position to find that it has proven a violation by clear and convincing evidence relating to Respondent's production of health and safety inspection reports after approximately June and July 2016.

assured Petitioner that the original production included the contract and associated documents. *See* [16-6] at 2.

In any event, it is evident from this record that Respondent has, or at least had as of the inspections that gave rise to the Subpoena, at least some copy of this contract. The record includes a letter from Ms. Van Tassell to Mr. McCrary, dated August 5, 2016, *i.e.*, the day of one of the underlying inspections and just eleven days prior to receipt of the Subpoena, giving notice of breach of the contract. Clearly demonstrating that Respondent possessed at least some copy of this contract, Ms. Van Tassell's letter quotes verbatim several specific pages, paragraphs and articles that Respondent was alleging McCary to have breached. *See* [27-2]. Without more explanation, the Court simply cannot accept the notion that Respondent lacked a copy of this contract at least as of the time of this letter, which was clearly after Respondent was on notice of the need to preserve documents relating to this inspection.

It is unclear whether Respondent is attempting to draw a line between some unexecuted or partially executed copy of the contract that it may possess, and a "fully executed" copy, which Ms. Van Tassell swears not to possess. It is, again, a reflection of at least a shockingly incompetent document filing system for Respondent to not have an "executed copy" of a less than three-month-old contract that it was seeking

to allege a breach of. But, regardless, it was a violation of the Court's order not to produce whatever copy Respondent evidently had and used to base its August 5 notice of breach letter on.

B. Violations not Proven by Petitioner

In all other respects, the undersigned does not find that Petitioner has proven a violation of the Court's orders by clear and convincing evidence. Generally, Petitioner's case in these regards amounts to doubts and skepticism that Respondent has produced all responsive documents. But doubts do not suffice. On the basis of the record currently before the Court, there is no basis to find contempt with regard to these other issues.

For example, Petitioner expresses great concern as to whether Respondent has produced all relevant text messages and emails. But Respondent has offered testimony explaining its gathering and production of such records, including that Ms. Van Tassell personally spoke to every one of Respondent's managers to inquire whether they had safety-related communications, and that she personally reviewed the communications in both her own and CEO Wedding's account. Ms. Van Tassell also testified that Respondent, after the contempt motion was filed, engaged in additional IT searches of its systems.

It is of course possible that Petitioner through investigative interviews or hearing testimony from Respondent's superintendents or other employees may develop evidence refuting Ms. Van Tassell's assertions, or otherwise demonstrating that responsive communications were not produced and/or not preserved. In such an event, Petitioner may have a strong case for a renewed request for severe sanctions before this Court and/or for adverse or even dispositive factual findings against Respondent before the factfinding tribunal. But such evidence has not been presented at this juncture.

Petitioner makes much of the lack of text message or email communications in this production. The lack of communications, however, without more, is not necessarily proof of a discovery violation. Petitioner has presented no basis to find, by clear and convincing evidence, that additional messages exist or existed as of the service of the Subpoena (and/or the time of the underlying inspections). Indeed, Ms. Van Tassell specifically testified that recent corporate practice or policy has been not to rely on texts and emails for communication. *See* [28] at 43-45. And Petitioner introduces evidence that Ms. Van Tassell has instructed company managers not to communicate in such a fashion, as it could be discoverable. Torres-Gilot Decl. [27-1] ¶ 9. It is not surprising, and in this day and age not necessarily obstructive, for a

company that has endured several rounds of inspections and document demands to attempt to reduce the volume of its discoverable communications.[7]

Petitioner also questions the timing of Ms. Van Tassell's actions, and argues that there is no evidence that Ms. Van Tassell attempted to gather relevant text messages until shortly before the Court-ordered production deadline of December 1, 2016. The Court agrees, as explained in the certification of facts above, that it appears Ms. Van Tassell's efforts in this regard occurred shortly before this deadline. But while this may have been another example of Respondent's cavalier approach to this matter, the Court's obligation is to carefully discern whether this in itself is evidence of contempt. In the end, Ms. Van Tassell reached out and attempted to gather

[7] The Court understands that the testimony cited by Petitioner was that Ms. Van Tassell, in connection with a prior Subpoena, not just instructed employees to communicate orally going forward, but also to destroy specific already-existing inspection reports that would have shown violations. This assertion is troubling to the Court. But in the end Petitioner does not specifically allege or present evidence of spoliation of specific documents during the time frame of this Subpoena. Even assuming the truth of this testimony, it only suggests destruction of documents not specifically responsive to this Subpoena and an instruction, going forward, not to create additional documents that might have ended up being responsive. This in itself is not a basis to find contempt with regard to the Court's orders in this case. And while this testimony certainly raises concerns as to the reliability of Ms. Van Tassell's testimony, it remains that Petitioner (who bears the heavy burden of proof) introduces no evidence that responsive texts or emails were not produced or preserved or otherwise refuting Ms. Van Tassell's testimony on this subject.

responsive materials (if any) from the relevant sources, and Petitioner does not demonstrate that her delay in doing so resulted in the loss of evidence.[8]

Similarly, that Respondent's employee lists differ from those created and maintained by the placement organizations with whom Respondent contracted does not in itself show a violation. Different and unrelated corporations might maintain their own business records, which may not always be entirely consistent with each other on every overlapping issue. That alone does not suggest that either or both companies are violating discovery orders when they produce what they claim they have. More evidence is necessary to prove that Respondent failed to produce its own responsive employee lists or related records.

Indeed, Respondent apparently takes the position that it changed the legal classification of its workers early in 2016, such that workers previously classified as employees became, according to Respondent, employees of subcontractors at a certain

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[8] A party seeking sanctions for the spoliation, or failure to preserve, evidence must show that: (1) the missing evidence existed at one time; (2) the Defendant had a duty to preserve the evidence; and (3) the evidence was critical to an element of the Plaintiff's case. *See Delta/Airtran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d 1299, 1305 (N.D. Ga. 2011) (Batten, J.)(citing *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962, at *2 (S.D. Fla. July 23, 2010)); *see also Dombrowski v. Lumpkin Cnty.*, No. 2:11-CV-0276-RWS-JCF, 2013 WL 2099137, at *13 (N.D. Ga. Mar. 21, 2013) (Fuller, M.J.), *adopted by* No. 2:11-CV-0276-RWS, 2013 WL 2096658 (N.D. Ga. May 13, 2013) (Story, J.).

point. Whether this is true or not, and whether it impacts Respondent's liability for OSHA violations or not, are not questions before the Court at this juncture. Indeed, it could be that the factfinding tribunal finds against Respondent on the factual point of whether its workers were employees or not, based in part on the PEOs' records. But this change in personnel classification could have plausibly impacted Respondent's records about its workers and explained differences with the information maintained by the temporary employment agencies. In any event, mere discrepancies between Respondent's records and those of third parties are not the basis of contempt.[9]

C. Remedies for the Violations

"Civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required." *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994). "The

[9] Nor does Petitioner prove contempt with regard to Respondent's failure to produce its contract with PEO Howard Leasing, which Respondent asserts it does not possess. While it remains suggestive of an incompetent filing system for Respondent to not possess copies of its operative contracts, the Court cannot conclude on the evidence before it that Respondent is actually withholding this document. Unlike with regard to the McCary contract, the Court has no specific evidence to refute Respondent's assertions that it, for whatever reason, does not have that contract.

traditional options for civil contempt sanctions include ... fines payable to the Court, compensatory fines payable to victims, fees and expenses of litigation, or modification of the permanent injunction." *United States v. Dinwiddie*, 885 F.Supp. 1299, 1304 (W.D. Mo. 1995). Also, when circumstances warrant, the Court may "coerce obedience to its orders by summarily holding a recalcitrant person ... in civil contempt and then imprisoning him until he complies." *In re Crededio*, 759 F.2d 589, 590 (7th Cir.1985). However, "[w]hen civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor's due process rights." *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1530 (11th Cir.1992) (citing *In re Grand Jury Proceedings*, 877 F.2d 849, 850 (11th Cir.1989)). Thus, a punitive sanction is inappropriate for civil contempt. "The Court has broad discretion to design a remedy that will bring about compliance." *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys.*, 369 F.3d 645, 657 (2d Cir. 2004). When imposing a civil contempt sanction, the following four factors must be assessed: (1) the harm from noncompliance; (2) the probable effectiveness of the sanction; (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in disregarding the court's order. *See United States v. United Mine Workers*, 330 U.S. 258, 303–304 (1947).

Here, while the Court finds certain violations, the Court does not find the extent of the violations alleged by Petitioner. The Court also lacks sufficient evidence to find malice or a specific intent to obstruct. The Court finds that the most severe sanction requested by Petitioner–incarceration–is significantly out of proportion to the severity of the violations established and is not remotely necessary to remedy the harm from Respondent's noncompliance. The Court likewise rejects Petitioner's request for open-ended financial penalties.

The Court instead recommends as follows:

(1) that Respondent be adjudged to be in contempt, which judgment can be lifted upon a Court finding based on a sworn, evidentiary showing, that the violations identified above have been cured;

(2) that a daily fine of $1,000, payable to the registry of the Court, be assessed against Respondent until the violations have been cured, as evidenced by the evidentiary showing described above, with a maximum fine of $30,000;[10]

[10] In the undersigned's judgment, the efficacy of continuing, daily monetary sanctions after 30 days would be doubtful. At that juncture, the prospect of more onerous evidentiary sanctions as proposed in paragraph 3 would replace the continuing daily fine. These evidentiary sanctions are geared to incentivize compliance and to allow a built-in remedy to alleviate the harm of any noncompliance that may remain.

(3) that to the extent Respondent fails to produce records of its purchases of safety equipment in the relevant period, missing safety inspection reports from January and February 2016, and a copy of its contract with McCary/ Five Star, within thirty days after the issuance of the contempt order, and that this failure continues to be uncured prior to the initiation of administrative proceedings, the Court orders that an evidentiary finding may be made by the factfinder, and relied upon by Petitioner in asserting allegations, that such records would demonstrate facts adverse to Respondent, including, but not limited to the following conclusions:

(a) With regard to non-produced records of purchases of safety equipment, the factfinder may presume (and Petitioner may allege) that Respondent purchased and furnished no safety equipment to workers during the relevant period except as specifically demonstrated by the records it has produced, which, so far, apparently would be nothing.

(b) With regard to non-produced safety inspection reports in January and February 2016, the factfinder may presume (and Petitioner may allege) that Respondent's reports if produced would demonstrate safety violations at its worksites.

(c) With regard to non-produced copies of the McCary contract, the factfinder (and Petitioner in its allegations) may reject any assertion of the existence

of that contract for purposes of avoiding or reducing Respondent's liability for the safety violations discovered at the relevant sites;

(4) that Respondent be permitted to depose Ms. Van Tassell or another corporate representative again, if and to the extent Respondent asserts that it has fully complied with any portion of this order and wishes to be relieved of contempt;

(5) that Respondent compensate Petitioner for the costs and expenses associated with the contempt action, and the deposition of Ms. Van Tassell, up to a maximum of $5,000.[11] Respondent must provide a detailed invoice for such costs and expenses within thirty (30) days of this Report and Recommendation;

(6) that the statute of limitations for Petitioner to bring charges in this case– relating to the August 2 and 5 inspections– be further extended to 90 days after the issuance of the Court's order of contempt. This is intended to allow for time for Petitioner to receive any additional documents as directed by this Order, conduct other

[11] The Court places a relatively low cap on this figure out of recognition that several of Petitioner's allegations that expanded the scope of the contempt litigation were rejected as unsupported by the Court. In other words, the Petitioner's aggressive and in some cases unsupported positions, along with the Petitioner's initial failure to support his allegations with any sworn testimony, unnecessarily contributed to the scope of these proceedings, which is a factor weighing against a greater award of costs.

necessary investigative steps that have awaited a full production of documents, and to assess and prepare citations as warranted.

IV. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED** that Petitioner's Motion for Contempt [16] be **GRANTED IN PART AND DENIED IN PART**, that Respondent be adjudged to be in contempt of the Court's orders, and that Respondent be subjected to the penalties stated above. As this is a Final Report and Recommendation, the Clerk is **DIRECTED** to withdraw the reference to the undersigned Magistrate Judge.

IT IS SO RECOMMENDED this 8th day of June, 2017.

JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE