II. The EEOC's Motion for Protective Order [Doc. #207]

A. The EEOC's Contentions

The EEOC first asks the Court to grant its motion to protect information that has an inherently *in terrorem* effect. It asks the Court to prohibit defendants from inquiring into any individual's immigration history or status. Citing case law, it notes that courts have held that social security numbers ("SSNs"), employment histories, places of birth, places of residence, post-Signal employment history and income, information about family members and tax documents have an *in terrorem* effect. It does not dispute that defendants are entitled to any alias used during an individual's employment with them.

The EEOC argues that the immigration status of any individual has no bearing on his entitlement to protection under Title VII and Section 1981. It contends that even were the Court to find the information relevant, that relevance is outweighed by the risk of injury and prejudice to any individual. It maintains that the production of such information will chill or outright preclude some of the individuals' claims. The EEOC argues that courts have recognized that the production of such information may even preclude other workers from maintaining their claims, thus limiting the enforcement of the federal civil rights statutes. It contends that it must be able to ensure all of the individuals' involvement in this lawsuit, their availability for discovery and trial and their willingness to communicate with the government as witnesses and victims.

The EEOC also notes that there is a widely-recognized policy against the disclosure of tax returns. It maintains that forcing such disclosure threatens the effective administration of our tax laws given the self-reporting of income and would deter future plaintiffs from coming forward. The EEOC contends that this reasoning applies to any document that would reveal income received or

sources of income (other than that received from Signal). It maintains that Signal can not demonstrate the relevance of such documents. The EEOC argues that courts have routinely held that any relevance of a civil rights plaintiff's employment history is outweighed by the risk of harm posed to the plaintiff.

The EEOC notes that the rest of the protective order sets out the procedure for all parties to follow in handling documents that a party deems to be confidential.

B. Signal's Opposition

Signal notes that this Court earlier denied it access to T-visa applications and other immigration-related documents in the related *David* lawsuit. Signal also notes that when it did so, the Court stated that the parties were concentrated on class-certification discovery, and that Signal may be able to establish such information's admissibility at trial during a later phase. In the order denying class certification, the District Court noted that it did not believe that the immigration evidence would remain collateral for purposes of trial. Signal notes that the District Court noted that plaintiffs were complicit with Signal when entering the country. This, Signal contends, alters the balance in its favor.

Noting that this Court earlier relied on a decision from the Ninth Circuit, Signal contends that the Fifth Circuit has never examined nor adopted that decision. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004). Signal doubts that the Fifth Circuit would adopt the Ninth Circuit's sweeping statement that never in an employment lawsuit will this information be relevant.

Signal maintains that it simply seeks to enforce its constitutional right under the Fifth Amendment to impeach its antagonists with powerful evidence that is probative of bias or lack of credibility. Signal contends that the evidence is squarely rooted in the litigation's origins. As the

District Court recognized, plaintiffs knew that green cards were difficult to obtain, and they could only obtain them from the United States government. The District Court also recognized that some of the plaintiffs were willing to misrepresent to obtain entry to the United States. An example of such misrepresentation, Signal argues, would be to devise a story of trafficking to remain here with their families. The District Court also noted that given the plaintiffs' own complicity in doing whatever was necessary to enter this country, Signal (and others) may be able to prove that the injuries alleged were not proximately caused by defendants' conduct. The District Court also pointed out that at least one plaintiff had worked in this country before under the H-2B visa and would have understood the temporary nature of such a visa.

Signal maintains that it and the EEOC must work together to craft a plan to utilize the information with as little collateral damage as possible. It argues that it is unreservedly willing to minimize this Court's and the EEOC's concerns.

Signal contends that it has a right to full, probing and effective cross-examination of every member of the class as to motive. It maintains that the EEOC potentially intends to present as witnesses at trial the approximately 500 class members here, and it has the right to cross-examine them to determine whether they invented the appalling conditions to bolster their trafficking claims.

Signal consents to the majority of the remaining protective order, but notes that it does not consent to the following: "Finally, as a federal government agency, the EEOC has substantial obligations to disclose documents not prohibited from disclosure by law, or valid reason." Signal notes that the EEOC cites to the Freedom of Info

With regard to the addresses and telephone numbers of former Signal employees, the EEOC has no objection to the provision if it is modified to allow dissemination to persons deemed, in good faith by counsel, necessary to the prosecution of the lawsuit.

III. Intervenor's Combined Opposition to Signal's Motion for Protective Order and in Support of the EEOC's Motion For Protective Order [Doc. #212]

must serve subpoenas on a non-party should it wish to speak to the non-party and use the home address and telephone number with respect to serving such a subpoena. Such a provision would delay litigation and increase expense.

IV. Law and Analysis

The Federal Rules state that before a protective order may issue, the movant must show good cause why justice requires an order to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense." *See* Fed. R. Civ. P. 26(c)(1). To make a showing of good cause, the movant has the burden of showing the injury "with specificity." *Pearson v. Miller*, 211 F.3d 57, 72 (3d Cir. 2000). In other words, the party seeking the protective order must show good cause by demonstrating a particular need for protection. *See Cipollone v. Liggett Group, Inc.*, 785

status of intervenors. Even if intervenors' current immigration status was relevant to the claims asserted by the EEOC, discovery of such information would have an intimidating effect on an employee's willingness to assert his workplace rights and subject such an employee to potential deportation. *See, e.g., Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) ("[W]ere we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported."); *In re Reyes*, 814 F.2d 168 (5th Cir. 1987) (granting mandamus and ordering district court to withdraw portion of discovery order allowing discovery of immigrants' current immigration status). The case law substantiates these fears. *See, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (noting that employer reported five undocumented workers after they voted in favor of union representation); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1062-63 (9th Cir. 2000) (allowing plaintiffs to plead their claims anonymously due to their fear of retaliatory deportation); *Fuentes v. INS*, 765 F.2d 886, 887 (9th Cir. 1985) (noting that employer reported undocumented workers he had employed for three years for less than minimum wage when they filed suit to recover wages owed), *vacated on other grounds by Fuentes v. INS*, 844 F.2d 699 (9th Cir. 1988); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1057 (N.D. Cal. 2002) (noting that employer recruited undocumented worker and then reported him to the INS after he filed an FLSA claim for unpaid wages); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1055 (N.D. Cal. 1998) (noting that employer reported an undocumented worker after she filed an FLSA claim for unpaid wages).

This is an action for unpaid wages and overtime for work actually performed for Signal. Courts have recognized the *in terrorem* effect of inquiring into a party's immigration status and

authorization to work in this country when irrelevant to any material claim because it presents a "danger of intimidation [that] would inhibit plaintiffs in pursuing their rights." *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (citations omitted). Here, intervenors' current

However, when the question of a party's immigration status only goes to a collateral issue, as in this case, the protective order becomes necessary as "[i]t is entirely likely that any undocumented [litigant] forced to produce documents related to his or her immigration status will withdraw from th

Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006). "While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution." *Rivera*, 364 F.3d at 1064. In *Rivera*, the court observed that granting employers the right to inquire into immigration status in employment cases would allow them to implicitly raise threats of such negative consequences when a worker reports illegal practices. *Id.* at 1065. And while Signal maintains that the Fifth Circuit would not adopt the reasoning underlying *Rivera*, this Court notes that the Fifth Circuit has on one occasion issued a writ of mandamus – an extraordinary remedy – to order a district court to withdraw that portion of its discovery order that allowed discovery of immigrants' current immigration status. *Reyes*, 814 F.2d at 170-71. As it has before, this Court finds that Signal's opportunity to test the credibility of plaintiffs does not outweigh the public interest in allowing employees to enforce their rights.

That the parties are not in class-certification discovery proceedings is of no moment. The case law cited by this Court does not distinguish between class-certification and merits-based discovery to arrive at their conclusions. Indeed, in many of the cases, it is not readily apparent that the plaintiffs sought class certification. The Court finds that the underlying reasoning and analysis of those courts apply equally here at this stage of the litigation. Accordingly, the Court grants the EEOC's motion with respect to this issue. This holding includes the non-disclosure of intervenors' tax returns. *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D 499, 503 (W.D. Mich. 2005).

As noted above, Signal also challenges the EEOC's inclusion of the following language in the procedure to be followed with regard to confidential documents: "Finally, as a federal

government agency, the EEOC has substantial obligations to disclose documents not prohibited from disclosure by law, or valid reason." Signal cites *Valenti v. U.S. Department of Justice*, 503 F. Supp. 230 (E.D. La 1980), as support for its argument that such language should be stricken from the proposed protective order because the Freedom of Information Act ("FOIA") does not apply to courts of the United States. The Court finds *Valenti* distinguishable.

The FOIA requires that each agency of the government shall make available to the public information of a variety of kinds consisting mainly of agency records. 5 U.S.C. § 552(a)(2)-(3). In defining the term "agency," the Act itself specifically exempts "the courts of the United States" from the definition. *Id.* § 551(1)(B). In *Valenti*, the question before the court was whether a witness before the grand jury was entitled to a transcript of his testimony before the grand jury under the FOIA. *See id.* at 231-33. The court, relying on Section 551(1)(B), ultimately concluded that he was not because the grand jury is an arm of the court, and the plaintiff's testimony was thus generated by a court – and not an agency – of the United States. *See id.* at 232-33.

That is not the situation here. The proposed protective orders in this lawsuit will not protect from disclosure records generated by a court of the United States. The 07 Tc-.wlVolvw(C -2.33 ncD proposi

requests, and they may request ESI in any format allowed under the rules. *Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D 556, 560 (N.D. Ill. 2008). The protective order in *David* [Doc. #1352] is inapplicable here.

With regard to the addresses and telephone num