United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. PILGRIM'S PRIDE CORPORATION, Respondent. - UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW), LOCAL 1996, Authorized Employee Representative.	OSHRC DOCKET Nos. 16-1458 & 16-1468

ORDER GRANTING RESPONDENT'S MOTION TO COMPEL

The Respondent has filed a motion to compel discovery dated May 4, 2017, seeking an order overruling the Secretary's objections to certain propounded interrogatories and requests for production and compelling the Secretary to provide information and materials that are responsive to those discovery requests. The Secretary filed its opposition to the motion dated May 18, 2017. The Respondent filed a reply (and later, on June 8, 2017, an amended reply) to the Secretary's opposition. The Authorized Employee Representative has not made any filing respecting the motion to compel.

The discovery requests at issue seek information relating to an administrative inspection warrant issued on March 9, 2016 by the U.S. District Court for the Middle District of Florida

(hereinafter "district court") authorizing the Secretary to conduct a comprehensive inspection of the Respondent's poultry processing facility located in Live Oak, Florida. The Respondent seeks the requested information with a view toward developing a more complete evidentiary record for a potential motion challenging the issuance of the warrant on the ground that the affidavit filed in support of the application for the warrant contained false statements and/or material omissions that were knowingly or intentionally made, or made with reckless disregard for the truth, without which probable cause would not have existed for issuance of the warrant. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978) (holding that in criminal proceedings, where a "defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request"); *Tri-State Steel Constr., Inc.*, 15 BNA OSHC 1903, 1917 (No. 89-2611, 1992) (consolidated) (applying the *Franks* standard in challenge to veracity of affidavit filed in support of an administrative inspection warrant to conduct an inspection and investigation pursuant to sections 8(a) and 8(f) of the OSH Act), *aff'd* 26 F.3d 173 (D.C. Cir. 1994).

The Secretary objected to providing information and material that would be germane to a *Franks* challenge to the affidavit that had been filed with the district court to support the application for the administrative inspection warrant, principally on relevancy grounds. In its opposition to the motion to compel, the Secretary asserts the information and material sought are not relevant because the Respondent had not made a "substantial preliminary showing" that the affidavit contained any false statements, so that discovery requests that sought information and

material germane to such a "substantial preliminary showing" should not be permitted. *See Tri-State Steel*, 15 BNA OSHC at 1917-20.

For the reasons described below, the motion to compel is granted.

Background

The Respondent owns and operates poultry processing facilities across the United States, including a facility in Live Oak, Florida that is the subject of the underlying citations here.

On January 27, 2016, the area office of the Occupational Safety and Health Administration (OSHA) located in Jacksonville, Florida, received a complaint from a person employed at the Live Oak facility reporting that an employee had been injured in a fall from a ladder.

On the morning of February 1, 2016, a team of three OSHA officials from the Jacksonville area office, led by Assistant Area Director Michelle Gonzales, arrived at the facility to commence an inspection and investigation. During the opening conference AAD Gonzales informed the facility manager, Mr. Thomas Giovanni, that OSHA intended to conduct an inspection of the facility as a result of the ladder-fall complaint, and intended also to conduct a wider scope inspection pursuant to a Regional Emphasis Program for Poultry Processing Facilities (Poultry REP) in effect in OSHA Region IV, which is headquartered in Atlanta, Georgia. (Gonzales Declaration 5/16/2017, ¶4; Giovanni Declaration 5/2/2017, ¶ 5).

Giovanni consented to OSHA conducting the inspection and investigation on the complaint, but denied consent for any broader inspection pursuant to the Poultry REP. Giovanni informed AAD Gonzales that it would be necessary for OSHA to obtain a warrant in order to conduct its intended wider inspection under the Poultry REP. (Gonzales Decl. ¶ 9; Giovanni Decl. ¶¶ 10-11.)

The OSHA team departed the facility late afternoon on February 1, 2016, but the team coordinated with the Respondent for the team to return later that evening to continue the investigation into the complaint. Accordingly, around 11:30 p.m. that evening, the team returned to the facility as planned, and departed in the early morning hours of February 2, 2016. (Gonzales Decl. ¶¶ 11-13; Giovanni Decl. ¶¶ 12-13.)

On February 10, 2016, two OSHA officials from the Jacksonville area office arrived at the Live Oak facility to conduct an inspection relating to a different employee complaint—this complaint involved reported lockout-tagout violations—and also to continue investigating the earlier ladder-fall complaint. The Respondent consented to the conduct of the complaint investigations, but also informed the inspectors that the Respondent would not consent to widening the scope of the inspection beyond investigation of the two complaints. (Gonzales Decl. ¶ 15; Giovanni Decl. ¶¶ 21-23.)

The Poultry REP under which OSHA sought to conduct a broader inspection than a complaint investigation is Directive Number CPL 16/08, subject "Regional Emphasis Programs for Poultry Processing Facilities," with an effective date of October 26, 2015.

Section I of the Poultry REP, titled "Purpose," includes the following pronouncement (emphasis supplied):

> This REP will provide the administrative authority to evaluate the employers' workplace(s) *at all programmed, unprogrammed, or other limited-scope inspections.* Area offices will normally conduct inspections for all complaints, formal and non-formal, which contain allegations of potential worker exposure to poultry processing hazards unless there are significant resource implications. *In addition and where applicable, all unprogrammed inspections will be expanded to include all areas required by this emphasis program.*

The "Scheduling" section of the Poultry REP (§ IX) prescribes a neutral protocol for selecting which poultry processing facilities within the domain of any given OSHA area office

are to receive a comprehensive health and safety inspection pursuant to the REP that year, as well as the order in which such facilities are to be inspected—the REP refers to the resulting sequential inspection list as the "program inspection register." However, paragraph IX.d. states that "[e]stablishments may be selected from the inspection register for inspection in an order that makes efficient use of available resources." This provision seems to authorize an area office to alter the sequence of inspection that had been neutrally established, provided that such an alteration of that sequence "makes efficient use of available resources."

Paragraphs a, b and c of the Poultry REP's "General Procedures" section (§ X) provide as follows:

> a. All inspections conducted at poultry processing facilities, either live-kill or further processing operations, are covered by this instruction.
> b. In accordance with the FOM, Chapter 9, Complaint and Referral Processing, Area Offices will normally conduct an inspection for all complaints, formal or non-formal, which contain allegations of poultry processing hazards.
> c. If an employer refuses to allow the compliance officer to perform a comprehensive inspection under this program to cover poultry processing operations, a warrant shall be sought in accordance with procedures in the current FOM.

The Poultry REP's "Inspection Procedures" section (§ XI) provides in paragraph XI.a that "[a]ny inspection activity performed under this emphasis program will be conducted as both safety and health comprehensive inspections." (Emphasis in original). Paragraph XI.b.1. describes certain circumstances in which an unprogrammed inspection (such as a complaint investigation) is *not* required to be expanded to a comprehensive inspection under the Poultry REP—e.g., "The CSHO will review the inspection file for the earlier inspection and confer with the Area Office managers to determine if an unprogrammed inspection is to be expanded." Paragraph XI.b.i. thus seems to be the only provision of the Poultry REP that limits the general

policy set forth in § I that "all unprogrammed inspections will be expanded" to a comprehensive inspection under the Poultry REP.

The "Outreach" section of the Poultry REP (§ XIV) directs all area offices in Region IV to "conduct outreach activities intended to reach as many employers and stakeholders as is practicable." The "Outreach" section provides further: "The method of outreach is at the Area Director's discretion; however, all efforts shall begin at least three months before the initiation of inspections."[1] (Emphasis in original). The Outreach section instructed OSHA area offices to do the following:

> Upon establishing a list of affected worksites, provide a letter to inform industry, employees, government and other stakeholders of hazards associated with that particular industry, *and inform employers of your outreach and targeting plan prior to commencement of inspection activities.*

(Emphasis supplied). The Poultry REP contained an exemplar of such an "outreach and targeting plan" letter in its Appendix A. That exemplar contains the following declaration: "Enforcement activities will begin not sooner than three months after outreach begins …."

On February 26, 2016, after the Respondent had denied the OSHA inspection team consent to conduct a comprehensive inspection of its Live Oak facility under the Poultry REP, the Area Director of OSHA's Jacksonville Area Office (Brian Sturtecky) executed an affidavit that was later filed with the district court in support of an application for a warrant authorizing OSHA "to conduct and complete a comprehensive safety inspection" of the Live Oak facility pursuant to the Poultry REP. The affidavit stated, among other things, that the Live Oak facility "has been selected for inspection pursuant to" the Poultry REP (Sturtecky Aff. ¶ 3). The

[1] Thus, assuming outreach efforts commenced on the effective date of the Poultry REP (October 26, 2015), the earliest date inspections under Poultry REP could be initiated would have been three months later, on or after January 26, 2016.

affidavit described the neutral procedure set forth in the Poultry REP for the development of the program inspection register. (*Id.* at ¶¶ 4-6). The affidavit stated further that the Jacksonville area office "generated correspondence to the … poultry processing facilities within its jurisdiction notifying them of its outreach efforts and targeting plan prior to inspection via certified mail," and that the area office had "received the green card return receipt with signature noting Pilgrim's … receipt of the correspondence" (*Id.* at ¶ 6), although the affidavit did not indicate either the date of that correspondence or the date of its delivery as is typically recorded on the green card return receipt. The affidavit stated that the three existing poultry processing facilities within the area office's territory "were numbered consecutively" and that a random table list was utilized to establish an "order of inspection" under the Poultry REP for those three facilities. (*Id.*). The affidavit does not specify the date on which the inspection list was generated, but it implicitly represents that the list was generated before February 1, 2016—paragraph 7 states that at the time of the inspection on February 1, 2016, the Live Oak facility "was number one on the inspection list compiled pursuant to the REP" and that one of the OSHA team members present at the opening conference that day was there for the purpose of conducting a comprehensive inspection pursuant to the Poultry REP.

On March 9, 2016, a United States Magistrate Judge granted the application for a warrant and issued a warrant for inspection of the Live Oak facility to "extend to all items delineated" in the Poultry REP.

On March 15, 2016, OSHA commenced an inspection of the facility pursuant to the warrant. The inspection was concluded on March 28, 2016, and resulted in the issuance of the underlying citations on July 21, 2016, which included citation items related to both of the complaint investigations as well as to the comprehensive inspection authorized by the warrant.

The material filed in connection with the Respondent's motion to compel reveals a conflict in the accounts of what AAD Gonzales said to Pilgrim's officials on February 1, 2016, and in the early morning hours of February 2, 2017, when she sought consent to broaden the scope of the ladder-fall complaint investigation pursuant to the Poultry REP. The Respondent has filed several affidavits that aver that on February 1 & 2, 2017, AAD Gonzales stated that the unprogrammed complaint investigation had "triggered" a comprehensive investigation under the REP that could last up to six months. (Giovanni Decl., ¶¶ 5, 9; Cheryl Smith Decl. 6/8/2017, ¶6; Halie Orr Decl. 5/31/2017, ¶ 6). The Giovanni declaration also avers that in the early morning hours of February 2, 2016, AAD Gonzales informed him that because OSHA understood that the employee who had fallen from the ladder had been hospitalized, and because the Respondent had not reported this hospitalization to OSHA, that the inspectors had the authority under the Poultry REP to expand the complaint investigation "to a full scope inspection." (Giovanni Decl. ¶¶ 14-15 & 19).

Each of the three declarations the Respondent filed in support of the motion contained averments that throughout the course of the two complaint inspections on February 1, 2 and 10, 2016, none of the OSHA officials stated that the Live Oak facility had been selected for a programmed inspection pursuant to an inspection list created pursuant to the Poultry REP. (Giovanni Decl. ¶ 23; Smith Decl. ¶¶ 7-8; Orr Decl. ¶¶ 7-8).

Regarding the Respondent receiving Poultry REP "outreach" correspondence from the area office, facility manager Giovanni averred that he is "not aware of the Live Oak facility receiving any REP outreach correspondence from" the OSHA area office in Jacksonville. (Giovanni Decl. ¶ 25).

The Secretary filed a declaration that AAD Gonzalez signed on May 16, 2017, in opposition to the Respondent's motion. The averments of AAD Gonzales' declaration conflict with the averments of the three declarations that the Respondent filed in support of its motion in the following salient respects: AAD Gonzales averred (1) that the Live Oak facility had been identified as "number one on the inspection list compiled pursuant" to the Poultry REP at some unspecified time prior to the time the OSHA team arrived at the Live Oak facility on February 1, 2017 (*id.* ¶¶ 3-4), (2) that during the opening conference on February 1, 2016, she informed the Respondent that OSHA intended to conduct a comprehensive inspection of the facility pursuant to the REP "because Pilgrim's was one of the establishments listed on the inspection list" (Gonzales Decl. ¶¶ 3-4), (3) that at the opening conference on February 1, 2016, she personally "provided Pilgrim's with … another correspondence letter notifying Pilgrim's of OSHA's outreach and targeting plan" under the Poultry REP[2] (*id.*, ¶ 7), (4) that in the early morning hours of February 2, 2016, she never stated that a reporting violation had triggered a comprehensive inspection (*id.*, ¶ 14), and (5) she "never made any statements suggesting that a complaint triggered a comprehensive inspection under the Poultry REP" (*id.*, ¶ 16).

Further in support of the motion, the Respondent has filed material that it argues "support the inference that no Inspection List existed, or if one does exist, it was created in response to Pilgrim's refusal to allow an expansion of the Ladder Fall Complaint unprogrammed inspection." (Memorandum in support of motion, p. 15).

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[2] Gonzalez's declaration reflects that this "outreach and targeting plan" correspondence was attached to her declaration as "exhibit 2." However, neither "exhibit 2" nor the other two exhibits referenced in the declaration were filed with the Commission along with the declaration itself. If this "outreach" correspondence was a copy of correspondence that had been sent to the Respondent before the opening conference on February 1, 2016, the correspondence would seem to have been a document responsive to disputed Request for Production No. 22 in case 16-1458, *infra*, and disputed Request for Production No. 31 in case 16-1468, *infra*.

The documents to which the Respondent points are:

- The case file diary created by the area office, which contains no reference to the creation of an inspection list, but rather whose entry for 2/1/2016 states simply that "[a]s per REP, CSHOs explained it was going to be a comprehensive insp." (Exh. 9 to Respondent's Memorandum).
- The safety narrative created by the area office that states the inspection "was initiated … due to a safety complaint" and "was supposed to be expanded to a comprehensive inspection as delineated in the" Poultry REP. (Exh. 10 to Respondent's Memorandum).
- The safety narrative created by the area office that notes the Respondent objected to the expansion of the inspection but contains no reference to any inspection list: "The employer objected [to] the comprehensive inspection indicating there was no reason to expand it even though the CSHOs explained the purpose and scope under the Poultry REP. Still the employer agreed to proceed with the complaint inspection." (*Id.*)
- The OSHA compliance officer's inspection notes that state the Respondent did not provide "authorization to expand under" the REP, but contain no mention of a targeted inspection list. (Exh. 11 to Respondent's Memorandum).
- A Site Specific Targeting inspection cycle list relating to an inspection that OSHA had conducted at another poultry processing facility that the Respondent operates within OSHA Region IV, which the Secretary produced to the Respondent (apparently without objection) in response to a discovery request in a other matter before the Commission (Docket No. 15-1699). (Exhibit 3 to Respondent's Amended Reply Memorandum).
- A redacted Poultry REP inspection list that OSHA officials provided to the Respondent prior to beginning a list-based programmed REP inspection at another of the Respondent's facilities within OSHA Region IV. (Exhibit 4 to Respondent's Amended Reply Memorandum).

The Respondent seeks to compel responses from the Secretary to the following interrogatories and requests for production:

Interrogatory No. 11 (Docket No. 1458): **If your contention is that the inspection at issue in this matter was a programmed inspection, please identify the program.**

Amended Answer: *The Secretary objects to this Interrogatory and declines to respond to the extent it seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving said objections, the Secretary directs Respondent to the OSHA investigative file relating to Inspection 1123183 attached hereto as Health Exhibit 1, particularly the Health Narrative. Please also see the Secretary's Privilege Log, attached hereto as Health, Exhibit 2.*

Interrogatory No. 20 (Docket No. 1468): **If your contention is that the inspection at issue in this matter was a programmed inspection, please identify the program.**

Amended Answer: *The Secretary objects to this Interrogatory to the extent it seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving said objections, the Secretary directs Respondent to the OSHA investigative file relating to Inspection 1122733 which has been produced as Safety, Exhibit 1, particularly the Safety Narrative and Complaint Item Responses. The Secretary has also produced a Privilege Log, attached thereto as Safety, Exhibit 2.*

Interrogatory No. 13 (Docket No. 1458) and Interrogatory No. 22 (Docket No. 1468): **Identify all individuals involved in, or with knowledge of, the creation of "a targeted inspection list pursuant to the Poultry REP," as stated on pages 4-5 of the "Ex Parte Application for an Administrative Warrant" in this case.**

Amended Answer: *The Secretary objects to this Interrogatory and declines to respond to the extent it seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence and on the grounds that it is overly broad and ambiguous.*

Interrogatory No. 14 (Docket No. 1458): **With respect to Pilgrim's Live Oak facility's selection for inspection "[u]sing Random Table List One referenced in Appendix C of CPL 02-00-025," as stated on page 5 of the "Ex Parte Application for an Administrative Warrant" in this case, please provide the following: a. The date on which Pilgrim's was selected for inspection; b. Who made the decision to select Pilgrim's for inspection;**

and c. Any and all criteria used, or facts related to, the selection of Pilgrim's for inspection.

Amended Answer: *The Secretary objects to this Interrogatory and declines to respond to the extent it seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence.*

Interrogatory No. 23 (Docket No. 1468): **With respect to Pilgrim's Live Oak facility's selection for inspection "[u]sing Random Table List One referenced in Appendix C of CPL 02-00-025," as stated on page 5 of the "Ex Parte Application for an Administrative Warrant" in this case, please provide the following: a. The date on which Pilgrim's was selected for inspection; b. Who made the decision to select Pilgrim's for inspection; and c. Any and all criteria used, or facts related to, the selection of Pilgrim's for inspection.**

Amended Answer: *The Secretary objects to Respondent's Request and declines to respond to the extent it seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence.*

RPD No. 1 (Docket No. 1458): **All documents identified in your answers to the Interrogatories served contemporaneously with these requests for production of documents, including, but not limited to those documents identified in your answers to Interrogatory Nos. 1-16.**

Answer: *The Secretary objects to this Request to the extent it seeks documents protected from disclosure by one or more of the following privileges: (1) the deliberative process privilege; (2) the work product privilege; (3) the attorney-client privilege; (4) the Governmental privilege for investigative files and techniques; and (5) the informer's privilege. The Secretary further objects to this Request to the extent it seeks documents or records protected from disclosure by the Privacy Act of 1974 ("the Privacy Act"), 5 U S.C. § 552a. Subject to and without waiving said objections, the OSHA inspection file for Inspection No. 1123183, is hereby produced as Health Exhibit 1, subject to any privileges specified therein. Please also see the Secretary's Privilege Log, attached hereto as Health, Exhibit 2. [Irrelevant portion of answer omitted].*

RPD No. 1 (Docket No. 1468): **All documents identified in your answers to the Interrogatories served contemporaneously with these requests for production of documents, including, but not limited to those documents identified in your answers to Interrogatory Nos. 1-26.**

Answer: *The Secretary objects to this Request to the extent it seeks documents protected from disclosure by one or more of the following privileges: (1) the deliberative process privilege; (2) the work product privilege; (3) the attorney-client privilege; (4) the governmental privilege for investigative files and techniques; and (5) the informer's privilege. The Secretary further objects to the Requests to the extent they seek documents or records protected from disclosure by the Privacy Act of 1974 ("the Privacy Act"), 5 U.S.C. § 552a. Subject to and without waiving said objections, the OSHA inspection file for Inspection No. 1122733 is hereby produced as Safety Exhibit 1, subject to any privileges specified therein. Please also see the Secretary's Privilege Log, attached hereto as Safety, Exhibit 2. [irrelevant portion of answer omitted].*

RPD No. 21 (Docket No. 1458) and RPD No. 30 (Docket No. 1468): **The "internet search of poultry processing facilities" identified on page 5 of the "Ex Parte Application for an Administrative Warrant" in this case.**

Amended Answer: *The Secretary objects to Respondent's Request and declines to respond on the grounds that it seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the Secretary objects on the grounds that an "internet search" is not a document subject to or capable of production.*

RPD No. 22 (Docket No. 1458) and RPD No. 31 (Docket No. 1468): **The correspondence sent to Pilgrim's Live Oak facility notifying Pilgrim's of OSHA's REP "outreach and targeting plan," as stated on page 5 of the "Ex Parte Application for an Administrative Warrant" including any proof of Pilgrim's receipt of that correspondence.**

Amended Answer: *The Secretary objects to Respondent's Request and declines to respond to the extent it seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Further, the Secretary objects as Respondent* is *in possession and/or control of the correspondence received at the Pilgrim's Live Oak facility.*

RPD No. 23 (Docket No. 1458) and RPD No. 32 (Docket No. 1468): **All documents related to the selection of Pilgrim's Live Oak facility for inspection under the REP, including without limitation any and all "cycle lists" in which Pilgrim's appears.**

Amended Answer: *The Secretary objects to Respondent's Request and*

declines to respond to the extent it seeks information that is *not relevant and* is *not reasonably calculated to lead to the discovery of admissible evidence and on the grounds that the phrase "related to the selection" is overly broad and ambiguous.*

RPD No. 24 (Docket No. 1458) and RPD No. 33 (Docket No. 1468): **All documents related to the randomization of the REP inspection list that listed Pilgrim's Live Oak facility.**

Amended Answer: *The Secretary objects to Respondent's Request and declines to respond to the extent it seeks information that* is *not relevant and is not reasonably calculated to lead to the discovery of admissible evidence and on the grounds that the phrase "related to the randomization" is overly broad and ambiguous.*

RPD No. 25 (Docket No. 1458) and RPD No. 34 (Docket No. 1468): **All documents related to the scheduling of Pilgrim's Live Oak facility for inspection under the REP.**

Amended Answer: *The Secretary objects to Respondent's Request and declines to respond to the extent it seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence and on the grounds that the phrase "related to the scheduling" is overly broad and ambiguous.*

Discussion

The Fourth Amendment governs inspections conducted pursuant to the OSH Act, and administrative inspections are subject to the warrant requirement. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). OSHA may obtain a warrant to conduct an administrative inspection in two ways. It may offer "specific evidence of an existing violation ... [or] ... show[] that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]'." *Id.*, 436 U.S. at 320-21; *Tri-State Steel Constr., Inc.*, 15 BNA OSHC 1903, 1911 (No. 89-2705, 1992) (describing *Barlow's* two alternative tests for establishing probable cause – the "specific evidence test" and the "administrative plan" test), *aff'd* 26 F.3d 173 (D.C. Cir. 1994). For an inspection conducted pursuant to an administrative

plan (the sole basis on which the magistrate judge found probable cause to issue the warrant here), the plan must be neutral so that employers are insulated from the "unbridled discretion [of] executive and administrative officers, particularly those in the field, as to when to search and whom to search." *Barlow's* 436 U.S. at 323. "[B]ecause employee complaints lack the administrative and legislative guidelines that ensure that the target of the search was not chosen for the purpose of harassment," *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1068 (11th Cir. 1982), an administrative plan that utilizes an employee complaint as a prompt for the conduct an expanded inspection is inconsistent with the *Barlow's* standard. *Trinity Indus., Inc. v. OSHRC*, 16 F.3d 1455, 1460 (6th Cir. 1994) (holding that a programmed full-scope inspection in response to an employee complaint "cannot be the product of the kind of reasonable administrative inspection plan proposed in *Barlow's*," and rejecting the Review Commission's conclusion to the contrary in *Trinity Indus., Inc.*, 15 BNA OSHC 1827, 1837-39).

To successfully challenge an administrative inspection warrant under *Franks*, a cited employer "has the burden of proving that the warrant affidavit included (1) false statements (2) that were knowingly or intentionally made or made with reckless disregard for the truth and (3) that were necessary to the magistrate's finding of administrative probable cause." *Tri-State Steel*, 15 BNA OSHC at 1917.

A theory that might underlie a *Franks* challenge to the Sturtecky affidavit is that on February 1, 2016, when the OSHA inspection team sought to expand the complaint inspection to a comprehensive inspection under the Poultry REP, the team was applying the Poultry REP's edict that "all unprogrammed inspections will be expanded to include all areas required by this emphasis program," and that contrary to the representations made in the affidavit, the Live Oak facility had not in actuality been previously selected for a comprehensive inspection by use of

the neutral protocol as precisely prescribed in § IX of the Poultry REP.[3] If, upon the conduct of a *Franks* hearing, a preponderance of the evidence establishes that the affidavit contained false statements or material omissions pertaining to the putative selection of the Live Oak facility for inspection pursuant to the neutral administrative plan set forth in the Poultry REP, and such false statements or material omissions were made deliberately or with reckless disregard for the truth, then *Franks* would require that the warrant application be reformed by setting aside the misstatements and/or by including the omissions, and determining whether the reformed application nonetheless establishes probable cause for issuance of the requested warrant. *Franks*, 438 U.S. at 171.

The Secretary argues that discovery of information or material that would be relevant to a *Franks* challenge to an affidavit is available only after the requesting party has met the *Franks* standard for entitlement to an evidentiary hearing. The Commission's decision in *Tri-State* provides some support for the Secretary's position that the necessary showing for mandating a *Franks* hearing—"a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and … the allegedly false statement is necessary to the finding of probable cause" [*Franks*, 438 U.S. at 155-56]—is the same showing that a cited employer must make *to obtain discovery* of material that would be germane to a *Franks* challenge. In *Tri-State*, the

[3]Exactly one week *after* the OSHA team here sought to commence a comprehensive inspection of the Live Oak facility in conjunction with an unprogrammed inspection, a different area office within OSHA Region IV attempted to do the same thing at another poultry processing facility based upon the Poultry REP's command to expand unprogrammed inspections to comprehensive inspections. A court issued an inspection warrant on that basis, but a magistrate judge later recommended that the warrant be quashed because the attempted expansion of the unprogrammed inspection into a comprehensive inspection under the Poultry REP ran afoul of the *Barlow's* standard. *Mar-Jac Poultry, Inc.*, 2016 WL 8938586 (N.D. Ga.) (Case No. 2:16-MC-004-JCF, Aug. 5, 2016) (magistrate judge's report and recommendation *approved and adopted* by district court judge on Nov. 2, 2016, case no. 2:16-CV-192-WCO-JCF).

Commission agreed with a Commission judge's denial of a motion to depose the OSHA official upon whose affidavit a court had issued an inspection warrant on the ground that the movants had "failed to make the 'substantial preliminary showing' that would have entitled them to conduct discovery into the underlying basis, the accuracy, or the completeness of the warrant affidavit." *Tri-State Steel*, 15 BNA OSHC at 1917. The Commission reviewed six claimed misstatements or material omissions of fact in the warrant affidavit and concluded that none of them met all three conditions of the *Franks* standard for entitlement to an evidentiary hearing:

- The Commission found that the first misstatement was not necessary to the magistrate's finding of probable cause. *Tri-State Steel*, 15 BNA OSHC at 1917-18.
- The Commission concluded that the argument regarding the second claimed misstatement simply "makes no sense." *Id.* at 1918-19.
- As to a third item, the Commission concluded there was no intent to deceive with respect to a claimed material omission in the affidavit. *Id.* at 1919. The Commission observed further that "while the affidavit might have been more clear in informing the magistrate that the inspection of the area described in the employee representative's complaint had basically been completed and that OSHA's intent was therefore to seek a geographic expansion of its inspection, we cannot conclude that the affidavit was misleading with respect to these matters." *Id.* at 1919.
    - Moreover, as to each of the preceding three items, the Commission noted that the parties had alerted the magistrate to each of the claimed falsehoods or omissions before issuing the warrant, and thus the magistrate could not have relied on them in finding probable cause. *Id.*
- As for a fourth item, the Commission found that the argument challenging a claimed misstatement in the affidavit "borders on the frivolous" and "was totally irrelevant to the magistrate's determination of administrative probable cause." *Id.*
- As for a fifth item, the affidavit's omission of mentioning an earlier objection to an expanded inspection had been brought to the attention of the magistrate before the magistrate issued the warrant. The magistrate was thus aware of the claimed omission and it could not have affected the probable cause finding. *Id.*
- And as to a final item, the claimed misstatement related to a matter of the affiant's opinion and was not an assertion of fact. *Id.* at 1919-20.

The Commission's lengthy treatment of the myriad claimed false statements or material omissions in the affidavit in *Tri-State Steel* does not reflect a holding that the standard for conducting discovery into material that would be germane to a *Franks* challenge is identical to the standard for mandating a *Franks* hearing. Rather, the Commission in *Tri-State Steel* essentially upheld a Commission judge's discretionary ruling on the scope of permitted discovery. *Cf. Sturm Ruger & Co.*, 20 BNA OSHC 1720 (No. 99-1873, 2004) (consolidated) (concluding the employer had not shown the judge had abused discretion in not permitting certain discovery on *Franks* a claim); *Del Monte Corp.*, 9 BNA OSHC 2136, 2141 (No. 11865, 1981) (observing that the "decision whether to allow discovery is within the judge's sound discretion" that "should be guided by the objective of providing a fair and prompt hearing to the parties," and that "the judge should consider the need of the moving party for the information sought, any undue burden to the party from whom discovery is sought, and, on balance, any undue delay in the proceedings that may occur"); Commission Rule 52(c), 29 C.F.R. § 2200.52(c) (allowing Commission judge to limit the frequency or extent of discovery if such discovery is "unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues in litigation"). In *Tri-State Steel*, by determining on the complete post-hearing record before it that none of the claimed false statements or material omissions could meet each of the three components of the *Franks* standard, the Commission implicitly but necessarily concluded that deposing the OSHA official who executed the affidavit on which the warrant was issued would not have affected the Commission's rejection of the *Franks* claim.

It would be paradoxical for the standard for obtaining discovery of matter that would be relevant to a *Franks* challenge to be the same as the standard for mandating a *Franks* hearing. If

a party were able to meet the standard for mandating a *Franks* hearing without conducting discovery on the issue, there would be a far less compelling need for that discovery than if the party were unable to make the "substantial preliminary showing" that *Franks* requires to obtain a hearing. It is particularly paradoxical with respect to the types of discovery requests involved here—interrogatories and requests for production—which the Commission's Rules of Procedures make available to the parties as a matter of right in Commission Rules 53 and 55, 29 C.F.R. §§ 2200.53 & 2200.55. It may be somewhat less paradoxical with respect to the conduct of depositions on a *Franks* issue, in that depositions are not available as a matter of right under Commission rule 56(a), 29 C.F.R. § 2200.56(a).[4]

A more reasoned standard for allowing discovery into material that is germane to a *Franks* hearing would be similar to the standard for allowing discovery in Commission

[4] In *Franks*, the Court crafted the "substantial preliminary showing" requirement in part in response to the concern that allowing a challenge to an affidavit that supported a warrant would be misused by criminal defendants as a way to conduct discovery that was not otherwise available: The Court in *Franks* noted the concern that "if such hearings were conducted routinely, it is said, they would be misused by defendants as a convenient source of discovery, and that "[d]efendants might even use the hearings in an attempt to force revelation of the identity of informants." 438 U.S. 167. The Court addressed this concern by creating the stringent "substantial preliminary showing" standard for obtaining a *Franks* hearing: "The requirement of a substantial preliminary showing would suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction." 438 U.S. at 170. It is manifest that the "substantial preliminary showing" devised in *Franks* was a product of the context of that case—a criminal prosecution, where historically discovery as a matter of right has been either non-existent or far more limited than discovery that is available in civil proceedings (or, for that matter, in proceedings before the Review Commission). *See* Fed. R. Crim. P. Rule 16; 2 Charles Allen Wright & Peter J. Henning, *Federal Practice and Procedure—Criminal* § 251 (4th ed. 2009). The *Franks* "substantial preliminary showing" standard, designed to diminish the potential for misuse of the *Franks* procedure to obtain discovery of information that would otherwise not be obtainable by a criminal defendant, addressed a concern that simply is not present in civil proceedings, where there are many and varied modes of discovery available to litigants as a matter of right.

proceedings on a potential claim for vindictive prosecution. The Commission described that standard in *Sturm Ruger& Co.*, 20 BNA OSHC at 1726, as follows:

> "To compel discovery on a vindictive prosecution claim, a defendant must show a colorable basis for the claim. A colorable basis is some evidence tending to show the essential elements of the claim." *United States v. Benson*, 941 F.2d 598, 605 (7th Cir. 1991) (quoting *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990)). *See also United States v. Schmucker*, 815 F.2d 413, 418 (6th Cir. 1987); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). *Cf., e.g., United States v. Lanoue*, 137 F.3d 656, 665 (1st Cir. 1998) ("generally where a defendant can point to specific facts that raise a likelihood of vindictiveness a district court must grant an evidentiary hearing on the issue," with the opportunity for discovery).

Another formulation of a standard for obtaining discovery of *Franks* information would be for the party seeking that discovery to demonstrate a reasonable suspicion that an affidavit filed in support of a warrant application contains a false statement of fact or material omission that was made knowingly or with reckless disregard for the truth, and that such false statement or material omission was material to the probable cause determination.[5]

The record that is presented on the motion to compel at the very least establishes both a colorable basis and a reasonable suspicion for a *Franks* claim. If the averments in the

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[5] *Cf. Brock v. Brooks Woolen Co., Inc.*, 782 F.2d 1066, 1069 (1st Cir. 1986), which includes the following dictum (internal citations omitted):

> [W]e observe that *Franks* does not proscribe scrutiny of warrant affidavits in the absence of the substantial showing that that case specifies; *Franks* merely holds that subfacial challenges are not *mandated* to protect a defendant's constitutional rights unless the specified showing is made. Thus, in the case of an administrative search warrant, where the probable cause required to secure the warrant is less than that necessary for a criminal warrant, it may well be that an ALJ should have some discretion to probe alleged falsehoods brought to his or her attention, even if the warrant challenge falls short of the *Franks* standards. But since the issue is not before us, we leave to another day discussion of the existence and scope of any discretion.

declarations filed by the Respondent are accepted as true for purposes of the motion to compel, no OSHA official informed the Respondent that the Live Oak facility had been selected for a comprehensive inspection pursuant to the neutral protocol set forth in the Poultry REP at any time prior to OSHA obtaining the warrant, and to date no documentary evidence has been disclosed to the Respondent to corroborate the averments that the Live Oak facility was duly identified for selection utilizing the neutral protocol of the Poultry REP. Rather, according to the declarations filed by the Respondent, OSHA officials advised the Respondent that the complaint inspection had "triggered" the comprehensive inspection under the REP. Such an explanation, if made, would have been entirely consistent with the provisions of the Poultry REP which established a general requirement that any unprogrammed inspection (such as a complaint inspection) be expanded to a comprehensive inspection under the Poultry REP. *See, e.g. Mar-Jac Poultry, supra* at footnote 3. The internal records created by members of the inspection team can also be viewed as corroborating the declarations filed by the Respondent—none of the contemporaneous records refer to the Live Oak facility having been identified for inspection under the neutral protocol of the Poultry REP independent of the complaint investigation. These circumstances alone give rise to both a colorable claim and a reasonable suspicion that when the area office commenced the complaint inspection on February 1, 2016, the area office had not yet identified the Live Oak facility for comprehensive inspection by utilizing the neutral protocol set forth in the Poultry REP.

Further, the time line starting from the effective date of the Poultry REP (October 26, 2015) provides only the thinnest of cushions for the area office to have begun enforcement activities after it commenced outreach activities. The Poultry REP requires that area offices not initiate inspections pursuant to the REP earlier than three months after outreach efforts begin.

Assuming outreach efforts commenced on the effective date of the REP, inspections should not have begun until three months later—no earlier than January 26, 2016. (The area office received the complaint about the fall from a ladder on January 27, 2016.) This circumstance similarly gives rise to both a colorable claim and a reasonable suspicion that the Live Oak facility had not been identified for inspection pursuant to the neutral protocol prescribed by the REP at the time that the area office received the complaint on January 27, 2016.

The confluence of these circumstances raises not only a reasonable suspicion, the record on the motion to compel considered in its entirety contains substantial circumstantial evidence that would support a finding of fact that statements in the affidavit filed in support of the warrant regarding the Live Oak facility's selection by use of the neutral protocol prescribed by the Poultry REP were false and were made knowingly or with reckless disregard for the truth. Thus, if the Commission's decision in *Tri-State Steel* does hold that the "substantial preliminary showing" standard for mandating a *Franks* hearing is likewise the standard that applies in determining whether a party may obtain discovery into matter that is germane to a *Franks* challenge, the record on the motion to compel makes such a substantial preliminary showing.[6]

Accordingly, it is ordered that the Secretary's objections to the challenged discovery requests identified above are overruled, and the Secretary shall provide substantive responses of information and material that is not otherwise privileged, within 14 days of the date of this order.

[6] It is entirely possible that the information and material that the Secretary provides to the Respondent in response to the contested discovery requests will disabuse the Respondent of its reasonable suspicion that the affidavit may have contained falsehoods or material omissions. For example, the Secretary represents in its memorandum in opposition to the motion, that the requested documents are maintained in a file other than the case file relating to the underlying inspection. (Memorandum in opposition, pp. 6-7). Upon production of that documentation, it is entirely possible the Respondent would decide not to request a *Franks* hearing. Further, if a request for a *Franks* hearing is later made and granted, it is entirely possible that the Respondent would fail to carry its burden of proof under *Franks*. Obviously, whatever evidence is presented in such a hearing, and the weight to be accorded such evidence, would remain to be seen.

Any claimed privileged material not provided shall be catalogued in an appropriately prepared privilege log.

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: July 17, 2017