DENVER LABOR DIVISION OF THE DENVER AUDITOR'S OFFICE

Denver Labor Division

v.

Evans Dining Services, Inc., dba PT's Showclub,
Galena Dining Services, Inc., dba PT's Showclub Centerfold,
Glenarm Dining Services, Inc., dba Diamond Cabaret

Respondents

ORDER DENYING MOTIONS TO QUASH AND GRANTING MOTION TO MODIFY SUBPOENAS

THIS CASE REPRESENTS THE FIRST under the subpoena provisions of DRMC §58-4, which only became effective in April of this year. It therefore warrants a more detailed analysis, and response by the undersigned, than might be called for in later years when the procedures and practices have had time to become established and understood. Ultimately, as set forth in detail below, I conclude that

1. The first issue in any subpoena dispute under §58-4 is whether the Denver Labor Division of the auditor's office properly initiated an investigation (or is conducting an enforcement action) under §58-3.
2. That issue was properly presented in this case.
3. Denver Labor, acting as an arm of the auditor's office, had grounds to initiate the investigation under §58-3(b).
4. An employer's characterization of persons who are performing work on their premises is not and cannot be dispositive of whether such persons are workers under the Ordinance, or something else entirely, and therefore does not and cannot determine the propriety

either of an investigation or a consequent subpoena.[1] I find these subpoenas to have been properly issued, as modified.

5. The Clubs have established neither an undue burden nor a confidentiality interest that would defeat Denver Labor's rights to the subpoenaed records.
6. Section 58-4(c)(3) gives the Hearing Officer broad authority to modify a subpoena based upon facts and arguments presented. On that basis, I grant Denver Labor's Motion and Order that the instant subpoenas be and are modified as set forth below, with time deadlines under the Ordinance based upon service of the modified subpoenas.

THE FACTS

IN LETTERS DATED MAY 3 AND 4, 2023, DENVER LABOR informed Evans Dining Services dba PT's Showclub and Glenarm Dining Services, Inc. dba Diamond Cabaret that it was "conducting a routine compliance audit" in line with its obligation under the recently enacted Civil Wage Theft Ordinance, the requests covering the time period back to three years prior to the letters themselves. A similar notice was sent to Galena Dining Services, Inc. dba PT's Showclub Centerfold on June 28, 2023.[2]

While the file isn't entirely clear, nor is this summary presented as other than background, on or about June 15, 2023, Denver Labor informed the first two Clubs that it had

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[1] The Ordinance avoids a kind of circularity that I find in the Clubs' argument – "Denver Labor cannot investigate whether entertainers are workers under the Ordinance because they cannot establish before initiating their investigation that entertainers are workers under the Ordinance" – in its definition of "employer" at §58-1(6), which does not require that the entity that is subpoenaed be "the employer" of the individuals whose status is in question. The Clubs are all employers of at least some employees.

[2] The Respondents are referred to collectively below as "the Clubs;" the industry in which they operate as "gentlemen's clubs"; and the individuals whose status is at issue are referred to as the "entertainers."

"determined [the Club] violated Denver's minimum wage law. The source of the underpayment is [the Club's] application of a tip credit, which per DRMC §58-16(b)(3) only applies to the food and beverage industry" and it would appear that, at least at some point, a similar letter was sent to the third club, in each case requesting specific records.

With what appear to have been intervening exchanges, either not in the record or not currently relevant, by the end of August 2023, the Clubs had provided information concerning individuals whom it may acknowledge to be workers under the Ordinance. (Their status isn't currently at issue, at least before me.) On May 15, 2024, Denver Labor made a specific request for additional records and it would appear that some have been produced, but the Clubs did not produce, and have never produced, the requested records for the entertainers. Their reasons for refusal are set out by counsel on June 21, 2024 following "Final Notice[s] to Provide Payroll Records" dated June 17, and again in its Motion to Quash pleadings.

The subpoenas are dated June 18, 2024. The Clubs' Motions to Quash were filed on July 9 and consolidated without objection on July 17. A non-evidentiary remote hearing was set for August 22nd, 2024, but in a pre-hearing conference on the 9th, I alerted the parties that it appeared to me after reviewing their briefs that both sides were making legal arguments based upon facts that weren't in the record, and I gave them additional time to submit written evidence and/or to request an evidentiary hearing. Both parties agreed quickly that no evidentiary hearing was necessary, and submitted additional exhibits on August 20th, in anticipation of the Augusts 22nd oral argument. At the end of oral argument on the 22nd, I also gave both parties permission to file (short) additional written argument by the end of day August 28th on some of the issues that were raised during that hearing.

The Motions have now been fully briefed and argued.

The Law

A. STANDARDS FOR QUASHING OR REVOKING INVESTIGATORY SUBPOENAS

BOTH PARTIES FRAMED the issue of whether to quash the subpoenas in terms of C.R.C.P Rule 45. However, these are investigatory subpoenas, not ones served in conjunction with an existing adversarial matter. The standards for investigatory subpoena revocation are generally slightly different, and more deferential to the issuing agency, than are the rules applied under CRCP (or FRCP) Rule 45, even if the Rules of Civil Procedure were applicable to this dispute.[3] (They are not or, at least, not except to the extent the Hearing Officer determines to apply them. Rule 6.3, Denver Auditor's Office Rules of Procedure for Appeals and Hearings.) I reference the standards "generally" applicable to investigatory subpoenas because the Ordinance does not, by its terms, make this distinction. It is, however, one that is found broadly in the law in comparable procedures and without specific guidance in the Ordinance, I have looked to that body of law for the standard to apply to these subpoenas.

A comprehensive summary of the law on investigatory subpoenas can be found in a decision of the U.S. Department of Justice Office of the Chief Administrative Hearing Officer:

> Complainant correctly notes that the standards governing the enforceability of an administrative subpoena are well established, indicating enforcement where:
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> (1) The purpose of the investigation is within the statutory authority of the agency;
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> (2) The information sought is reasonably relevant to the inquiry; and
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> (3) Procedural requirements have been observed.

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[3] Among the dozens of federal agencies with the power to issue investigatory subpoenas, only a few reference Fed.Rules.Civ.Pro Rule 45 among their standards. Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities, **https://www.justice.gov/archive/olp/rpt_to_congress.htm**

> *United States v. Powell*, 379 U.S. 48, 57-58, 13 L.Ed.2d 112, 119, 85 S.Ct. 48 (1964); Morton Salt, 338 U.S. 652-53, 94 L.Ed. 416*; EEOC v. Maryland Cup Corp.,* 785 F.2d 471, 475 (4th Cir. 1985); *EEOC v. Children's Hosp. Medical Ctr. of N. California*, 719 F.2d 1426, 1428 (9th Cir. 1983); *Federal Election Comm'n v. Larouche Campaign*, 644 F.Supp. 120 (S.D.N.Y. 1986), aff'd 817 F.2d 233 (2d Cir. 1987); *EEOC v. Delaware State Police*, 618 F.Supp. 451, 452-53 (D.Del. 1985); Florida Azalea, at 2 (1/8/93); *In re Investigation of Carolina Employers Ass'n*., 3 OCAHO 455, at 2 (9/17/92); *In re Investigation of Florida Rural Legal Servs. v. Immokalee Agric. Workers*, 3 OCAHO 437 at 6 (6/15/92). *See also EEOC v. Tempel Steel Co*., 814 F.2d 482, 485 (7th Cir. 1987); *United States v. Westinghouse Corp*., 788 F.2d 164, 166 (3d Cir. 1986); *Federal Election Commission v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284 (11th Cir. 1982). *See generally United States v. McAnlis*, 721 F.2d 334, 336 (11th Cir. 1983); *Matter of Newton*, 718 F.2d 1015, 1018-19 (11th Cir. 1983) (tax summons enforcement proceedings).

OCAHO Investigatory Subpoena No. 93-2-0002, 1993 OCAHO LEXIS 34, *3-4. In the context of a federal Department of Labor investigation into possible Fair Labor Standards Act violations, a recent federal court decision from New York adds some clarity to the standard:

> [T]he district court's role in a proceeding to enforce an administrative subpoena is extremely limited." *E.E.O.C. v. United Parcel Serv., Inc.*, 587 F.3d 136, 139 (2d Cir. 2009) (quotation marks omitted). The agency seeking to enforce the subpoena need only show:
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> > [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within [the agency's] possession, and [4] that the administrative steps required . . . have been followed.
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> *Id*.
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> An agency may establish that these requirements have been met through "[a]n affidavit from a governmental official. . . ." I*n re McCane*, 44 F.3d 1127, 1136 (2d Cir. 1995); see also *United States v. Navarro*, 304 F. App'x 908, 910 (2d Cir. 2008). If an agency seeking enforcement of a subpoena meets these requirements, the "subpoena . . . will be enforced unless the party opposing enforcement demonstrates that the subpoena is unreasonable, or issued in bad faith or for other improper purposes, or that compliance would be unnecessarily burdensome." *N.L.R.B. v. Am. Med. Response, Inc.*, 438 F.3d 188, 192-93 (2d Cir. 2006) (quotation marks omitted) (emphasis in original).

Su v. Pamper Our Parents, Inc., __ F.Supp. 4th ___, 2024 U.S. Dist. LEXIS 15466 (E.D.N.Y 2024). *Cf. People v. Fleming,* 804 P. 2d 231, 233 (Colo.App. 1990)("An administrative subpoena

of documents is constitutionally valid if (1) the investigation is for a lawfully authorized purpose; (2) the information sought is relevant to the inquiry; and (3) the subpoena is sufficiently specific to obtain documents which are adequate but not excessive for the inquiry.")

"[T] he very purpose of [an administrative] subpoena ... is to discover and procure evidence, not to prove a pending charge or complaint. " *EEOC v. Bessemer Group Inc*., 105 Fed. Appx. 411, 414 (3d Cir. 2004).

B. I HAVE THE AUTHORITY TO ADDRESS WHETHER THE INVESTIGATION INTO THE CLUBS WAS PROPERLY INITIATED.

WHILE THE ULTIMATE QUESTION BEFORE ME IS the propriety of the subpoenas, the Ordinance itself suggests the question that was raised by the Clubs in their Reply brief and the standard for review set out above: Were the subpoenas issued in conjunction with a legitimate investigatory purpose?

D.R.M.C. 58-4(c) states that "The auditor is authorized to issue a subpoena to compel the production of records or tangible things in the custody of an employer **if such records . . . are relevant in connection with investigation** or enforcement under this article."[4] [Emphasis supplied] Nonetheless, in an email communication on August 13, 2024, Denver Labor suggested that I do not have the authority to address this question, because it was first raised by the Clubs in their Reply. In a follow-up which I requested during the oral argument, Denver Labor fleshed this argument out further in an email on August 27, relying on the language of §58-4(c)(3) to

[4] In oral argument, the Clubs argued that the subpoena power lay with "the auditor" and not with its Denver Labor division. Without any further support for the Clubs' position, I conclude and hold that Denver Labor, as a division of the auditor's office and its enforcement arm for the Civil Wage Theft Ordinance, has the authority that the sections give by designation to the auditor.

assert that my authority in regard to a Motion to Quash doesn't extend to evaluating the initiation of the investigation and that, in any event, this argument was waived by the Clubs by failing to raise it until their Reply brief.[5]

I reject both parts of this argument.

As to the first, I refer back to the language cited above, and the language of §58-4(c) that Denver Labor cites: The auditor is authorized to issue a subpoena for tangible things relevant in connection with an investigation. And then, under subsection (3), Hearing Officers have the authority to quash a subpoena upon a finding that the production would be unduly burdensome. No subpoena could be **more** burdensome than one issued on a whim, a wing and a prayer. Without a legitimate investigation, **any** subpoena is unduly burdensome. This is a (non-circular) formulation of one of the Clubs' primary arguments – If Denver Labor wasn't properly investigating the terms under which entertainers work, then producing **any** of the Clubs' business records about the entertainers is unduly burdensome. Further, the final sentence of §58-4(c) states that "Any final decision shall be tailored to address the issues raised in the motion **or otherwise identified by the hearing officer.**" [Emphasis supplied] This issue was, if nothing else, clearly identified from August 9 on, and addressed by both parties.

As to the second argument, I would continue the quotation from *Bordertown, LLC Plaintiff v. Amguard Ins. Co*., 2022 U.S. Dist. LEXIS 223863, *3-4 (D.C.Colo. 2022), the start of which Denver Labor provided :

> These same considerations apply at the district court level, where courts in this circuit routinely refuse to consider arguments which have been presented only in a reply brief. *See, e.g., Estate of Jensen by Jensen v. Clyde*, 2022 U.S. Dist.

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[5] I pass over the irony of Denver Labor first raising its §58-4(c) argument after oral argument.

> LEXIS 167972, 2022 WL 4268787 at *6 (D. Utah Sept. 15, 2022) ("[T]his court ordinarily does not consider arguments raised for the first time in a reply brief. . . **because [i]t robs the [opposing party] of the opportunity to demonstrate that the record does not support [the reply's] factual assertions and to present an analysis of the pertinent legal precedent that may compel a contrary result.") (internal quotation marks and footnotes omitted; alterations in original**); [Emphasis supplied]

I am disinclined to apply a procedural rule to foreclose argument in a hearing that is the first of its kind under a brand new law, and conclude that, in any event, any procedural requirements for notice to Denver Labor that this is an issue were met by my alerting the parties on August 9 that I would consider this question and by my soliciting, and receiving, evidence and argument.

C. THE CLUBS CANNOT DEFEAT AN OTHERWISE LEGITIMATE SUBPOENA BY ASSERTING THE VERY FACT AT ISSUE – ARE THE ENTERTAINERS COVERED BY AND PAID IN ACCORDANCE WITH THE ORDINANCE?

1. The Wage Theft Ordinance contemplates Denver Labor investigating potential worker misclassification, and the subpoena power follows from that.

THE CLUBS ARGUE THAT neither the §58-3 nor, derivatively, §58-4 contemplate that Denver Labor can initiate an investigation into the possible misclassification of their entertainers because

> . . . Denver's City Council made no mention of Denver Labor being able to classify Licensees as workers when it approved Civil Wage Theft Bill No. 22-1614 on December 20, 2022. Nor when Denver City Council amended the Civil Wage Theft Bill to expand the Denver Auditor's Office subpoena powers, did it contemplate that Denver Labor would have the authority to subpoena documents to determine the Licensees' classification.

Reply, p. 3. However, Denver City Council **did** make mention of the role of Denver Labor in investigating potential worker misclassification (DL Ex. 5, Slide 5); as Denver Labor noted in an email message of May 31, 2024 (DL0047), it has "not reached a similar conclusion" to the Clubs concerning the proper classification of the entertainers; and (as philosophers have noted for

centuries) the absence of evidence is not the same thing as evidence of absence – the Denver City Council didn't mention "operatives," or "staffers," or "hands," but those omissions would surely not prevent Denver Labor from investigating whether any individuals designated under those titles are workers as defined by the Ordinance, or are victims of wage theft. The fact that, according to the Clubs, the entertainers are "licensees" is the start of a question, not an answer.[6]

Indeed, while the Clubs also contend that "there is no guidance under Denver Labor's new subpoena powers indicating it can request documents to *sua sponte* determine an individual's employment status or classification. See id. §58-4(c)." (Reply, p. 3), Council's discussion of the newly granted subpoena power evidenced sensitivity to the fact that not all relevant records can be identified as falling into a narrow category of reports. On April 9, Council Member Flynn described the subpoena power as necessary for the auditor to receive "the payroll records, or whatever it is that the auditor is seeking . . ." (Clubs' Ex. F, 34:11-34:14), indicating that Council did not intend a limited view of the subpoena power, and certainly not a limitation to records for individuals who had already been established to be workers with traditional pay records. On the 29th Council Member Paraday talked about the need for the auditor's office to "get the information they need up front to figure out what's going on; . . . whatever that might be" to "get under the hood." (Clubs' Ex. I, 31:52-32:12) In asserting that subpoenas can only be issued in support of a "failure to pay" proper wages under the Ordinance (Oral Argument, 17:00-17:22), the Clubs minimize the significance of misclassification as a **c**lassic form of minimum wage violation. *See, e.g., Alexander v. FedEx Ground Package System,*

[6] I will continue to refer to the Clubs' position that the entertainers are "licensees," but note that there isn't any evidence beyond lawyers' assertions to support that characterization – The Clubs haven't offered even a form "license" in evidence. Lawyers' assertion, even those based upon their interpretation of documents they have read, are not evidence.

Inc., 765 F. 3d 981(9th Cir. 2014); *Cf. Ferrera v. Foulger-Pratt Construction Inc.,*___ F.Supp 4th ___, Case No. 1:24-cv-00262 (TNM) (D.C.D.C., August 26, 2024)(approving a settlement of a suit brought under the FLSA alleging misclassification of employes as independent contractors.)

2. Whether entertainers are workers under the Ordinance cannot be determined by the Clubs' bald assertion that they are "licensees."

CENTRAL TO THE CLUBS' ARGUMENT is its repeated assertion that the entertainers are "licensees" as distinct from either Independent Contractors or employees, and therefore that Denver Labor has no authority to investigate whether their financial relationship with the Clubs is in violation of the wage theft ordinance. Motion to Quash, pp. 5-6: "Denver Labor's refusal to acknowledge the legal status of the Licensee's relationship to the Company and instead, rely on the subpoena to compel production of documents, and records . . . would require the Company to create documents for Licensees who are not employed by the Company . . ."; Reply in Support of Motions to Quash Subpoenas: Online advertisements touting the Clubs' beautiful women and "Sexiest Topless Entertainment"[7] are generic, and don't "imply any employment relationship;" Reply p. 2; "The Division's subpoenas are overly broad and intrusive, exceeding the reasonable scope of the investigation, as they request information that does not exist **because the Licensees are not employees"** Reply, p. 5, Emphasis supplied.[8]

To quote Minnesota friends – Uffda!

The transparent circularity of the argument, as well as its rejection of the actual language of DRMC §58-4(c) in regard to subpoenas in support of investigations, raise questions about

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[7] *See, e.g.*, https://www.thediamondcabaret.com/

[8] Similar statements were made throughout oral argument on August 22, including counsel's assertion that the subpoena powers under §58-4, which ties subpoenas to investigations as well as enforcement actions, "were meant to go hand-in-hand with certain wage violations . . ."

whether these arguments are made in good faith. The legal status of the entertainers' relationship to the Club is what may be decided at some later date if Denver Labor issues a wage determination finding that they have been misclassified and that they have not been paid in accordance with the Ordinance. However, that is not a legal finding that can rest now, or will ever rest, on lawyers assertions or the sole evidence the Clubs have actually proffered, their websites.

Or to quote a more authoritative source, the Supreme Court, writing of an investigatory subpoena issued by the Administrator of the Wage and Hour Division of the Department of Labor in *Oklahoma Press Publishing Co. v. Walling*, 327 US 186, 213-214 (1945):

> **. . . petitioners' view, if accepted, would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him.** And if his functions could be thus blocked, so might many others of equal importance.
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> We think, therefore, that the courts of appeals were correct in the view that Congress has authorized the Administrator, . . .to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; . . . [Emphasis supplied]

Further, if a further were needed, there is no evidence that the entertainers are "licensees," even if that status were established conclusively by signatures on what is called a "license," because the Clubs haven't provided even form "licenses" which they allege the entertainers sign. The Clubs' position is that apparently that it is enough that they say so. But this will not be decided on their say-so.

In its Response Brief, Denver Labor cites a number of cases from around the country that, taken together, demonstrate that the entertainers in gentlemen's clubs such as Respondents have performed under a number of different titles and contractual arrangements (including

"licensee") which have nonetheless been held to establish either employee or independent contractor status. *Shaw v. Set Enterprises, Inc.,* 241 F. Supp. 3d 1318 (D.C.S.D.Fla. 2017); *Schofield v. Gold Club Tampa, Inc*., (D.C.M.D. Fla 2021)("After Gold Club determines a dancer may perform, she signs a "performance agreement/lease agreement." . . . The agreement states that the "relationship of the parties hereto is that of The Business as `Licensor' and `Lessor' and Performer is a Licensee and Temporary Space Lessee . . ."). None of these decisions can be reached without evidence. None was decided on the clubs' bare assertions as to the legal status of the entertainers.

D. DENVER LABOR HAD AUTHORITY UNDER DRMC §58-3(B) TO INITIATE AN INVESTIGATION OF THE PROPER CLASSIFICATION OF THE CLUBS' ENTERTAINERS

THIS IS THE CRUX OF THIS DISPUTE, and it is the most problematic question: What is sufficient evidence in the hands of Denver Labor to permit it to start an investigation without a complaint? Denver Labor offers two primary pieces of evidence, the affidavit of its Executive Director, who "instructed [his] team to identify and proactively investigate strip clubs in Denver" in the spring of 2023, and a news report from 2019 dealing with wage-and-hour cases nationally involving entertainers whose work appears to parallel that at the Clubs. Dr. Fritz-Mauer's affidavit itself references other information upon which he attests that he relied.

For the reasons set forth below, and in recognition of the relatively deferential legal standard for investigatory subpoenas, I find that Dr. Fritz-Mauer's affidavit, standing alone, would be insufficient, but the news report provides sufficient evidence to have permitted Denver Labor to have initiated the investigations in this case.

1. Dr. Fritz-Mauer's affidavit

a) The absence of a notarized signature doesn't invalidate the affidavit.

NEAR THE END OF ORAL ARGUMENT, the Clubs suggested that I should disregard the affidavit because it doesn't have a notarized signature. I decline to do so. I do not understand this to be a substantive attack on the accuracy of the affidavit. If the Clubs had a concern about the accuracy or credibility of Dr. Fritz-Mauer's affidavit, they had two days (and, indeed, the start of the hearing on August 22nd) to request an evidentiary hearing in which he would have been expected to testify under oath and subject to cross-examination. While a notarized signature on an affidavit is A Good Thing (and one that I would suggest that Denver Labor employ in the future), it would elevate form over substance to disregard this affidavit now.

b) Dr. Fritz-Mauer's affidavit is not sufficient evidence of data collected or received by the city to establish a reasonable basis to conclude that the industry in which the Clubs participate is likely to have failed to comply with the terms of the Ordinance.

THE SUBHEADING PARAPHRASES DRMC 58-3(B)(4), and in relation to Dr. Fritz-Mauer's affidavit, could be turned around into a question: Does his affidavit provide sufficient evidence of data collected or received by the city to establish a reasonable basis to conclude that the industry in which the Clubs participate is likely to have failed to comply with the terms of the Ordinance? Taking the parts of this question one-by-one:

i. Is Dr. Fritz-Mauer "the city" for purposes of receiving or collecting data?

YES. As Executive Director of the Denver Labor Division of the auditor's office, information or data collected or received by him concerning the Ordinance which it is the auditor's responsibility to enforce is received by "the city." To hold otherwise would almost entirely limit investigations to formal complaints received, which is contrary to the plain meaning of §58-3(b).

ii. Dr. Fritz-Mauer's affidavit does not, on its own, establish that *the city* had triggering data before initiating its investigation.

DR. FRITZ-MAUER'S AFFIDAVIT sets out a credible history of his own knowledge of the prevalence of wage-and-hour violations in the gentlemen's club industry. What it doesn't do, though, is detail "the city" receiving data other than from his own prior knowledge. What Matthew Fritz-Mauer, student, advocate, writer and researcher knew, collected and received isn't the same thing, for these purposes, as what 'the city" knew, collected and received and the affidavit doesn't assert that Executive Director Fritz-Mauer had his office do any research or collect any data of the sort with which Matthew Fritz-Mauer was familiar. If Dr. Fritz-Mauer's prior personal knowledge and experience were all Denver Labor were relying on, it would have jumped the gun.

2. Denver Labor Ex. 4, Daily Labor Report, 10/21/19, "Strippers Winning Employee Status Challenges Gig Economy's Norms.[9]"

DRMC 58-3(B)(2) AND (3) take the city's (or auditor's) own data collection out of central consideration in the initiation of an investigation without a complaint and for those sections, there is adequate evidence.

Section 58-3(b)(2) states that a "reasonable basis to believe that a violation occurred exists if . . . [a] pattern or practice including, but not limited to, receipt of multiple credible complaints . . . demonstrates an increased likelihood that certain workers within an industry are regularly not paid wages . . ." Section (b)(3) addresses "credible information from a

[9] The Clubs assert that they don't call their entertainers "strippers," and have made various arguments about the lack of evidence about their own, or Colorado, or Denver practices. These are barely serious arguments – What the Clubs do not, and cannot credibly, deny is that they are in the industry that is addressed in the new story and various legal decisions that have been cited, and that is the relevant universe under the Ordinance.

governmental agency that demonstrates an increased likelihood that a particular . . . industry has failed to comply with" the Ordinance. In oral argument (1:08:07-1:08:24) and again in their August 28th Supplemental Argument, the Clubs assert that the 2019 report was too old, because it predated the investigation; that it was irrelevant because it dealt with cases under the federal FLSA; and was further irrelevant because it didn't address any Colorado cases. Addressing these arguments in order:

- It is self-evident that data is not "too old" because it predated the investigation: Data to initiate an investigation must, by its very nature predate the investigation. Whether 2019 data is "too old," of itself, is at least a real question, but I conclude that data reported in October 2019 is not too old to support an investigation begun in early 2023, according to Dr. Fritz-Mauer's affidavit, ¶16-17. Where there is evidence of a long-time pattern and practice in an industry (*See, e.g., Shaw v. Set Enterprises, supra*; *Hart v. Rick's Cabaret Int'l, Inc*., 967 F. Supp. 2d 901, 912 (S.D.N.Y. 2013)), it is reasonable to conclude that it is unlikely that the industry has changed so dramatically in 2 ½ years that there is no "reasonable basis to believe that a violation has occurred," (§58-3(b)) at least for purposes of an investigation.
- The fact that the news report is focused on federal Fair Labor Standards Act violations is not significant for these purposes: The broad issues under the FLSA are, like those under the Ordinance, whether persons performing work are properly classified and fairly compensated, and that is an issue common to the industry of gentlemen's clubs.

- To similar effect, the Clubs are certainly correct that any findings about their practices will need to be based in facts that are specific to them and relevant to the Denver Ordinance. Indeed, that is also Denver Labor's stated position, and a basis for their subpoenas. But that doesn't mean that the initiation of an investigation needs to be based on Colorado-specific data. §58(b)(1) is, in essence, Denver-specific, which supports the conclusion that subsections (2)-(4) are not, applying the fundamental rule of statutory interpretation that presumes there is significance to different formulations in different sections of the same law. Subsections (2)-(4) address an "industry," and industries (including, in this case, gentlemen's clubs) exist outside of Denver and outside of Colorado. It may be that **these Clubs** would ultimately be found to operate in a manner that is consistent with the Denver Ordinance but that is, as previously stated, an issue for another day.

E. THE CLUBS HAVE ESTABLISHED NEITHER AN UNDUE BURDEN NOR A CONFIDENTIALITY INTEREST THAT WOULD DEFEAT DENVER LABOR'S RIGHTS TO THE SUBPOENAED RECORDS.

THE CLUBS' ARGUMENT ON UNDUE BURDEN WAS, yet again, largely circular: Because (they assert) the entertainers are not covered by the Ordinance, it is undue burden for the Clubs to produce any documentation regarding their work that might establish whether they are covered by the Ordinance. The Clubs offered no evidence that would meet general standards of "undue burden" for production of business records, so I reject that argument. The fact that the Clubs may have produced extensive records for persons other than the entertainers has nothing to do with this case. If that is offered as evidence that producing additional records is an undue burden, I reject the argument. If employers have lots of records, they may need to produce a lot. That doesn't make the production "unduly burdensome."

The assertion of confidentiality is better fleshed out: It is the Clubs' position that "contractual language [] prohibits the Company from sharing the requested information due to strict confidentiality clauses, explaining that the Company cannot breach its contractual duties to its Licensees" (Motion to Quash, p. 2); that "the Company is contractually prohibited from providing any names or contact information of its Licensees to Denver Labor. Due to the sensitive nature of the Licensee's chosen industry, Licensees value their privacy and are protected under a strict confidentiality clause" (*Id.* at 6); that "The confidentiality of Licensees' information is crucial for their safety and privacy, and the Companies are contractually obligated to protect it, by providing as much information as possible without breaching the enforceable confidentiality clauses." (Reply in Support of Motion to Quash, p. 7). However, the contractual language upon which the Clubs reply doesn't support their argument.

a) The confidentiality clause proffered by the Clubs as grounds for resisting the subpoenas clearly excepts production "otherwise required by law."

THIS IS THE HEART OF DENVER LABOR'S position on whether the confidentiality clause which the Clubs represent is part of their license/site rental agreements is sufficient to defeat the subpoenas.

Properly issued subpoenas are a classic example of a procedure under which production is "otherwise required by law." *See, e.g., Health Grades v. Christopher Boyer & Patrick Singson,* 2010 Colo. Dist. LEXIS 1229 (D.C.Jeff.Co. Colo, 2010)(setting out the terms of a protective order, including treatment of confidential information, which could only be disclosed "pursuant to a subpoena or court order, or as otherwise required by law"); *Davis v. T&T Express Shipping, LLC*, 2024 U.S. Dist. LEXIS 20452, *5 (S.D.N.Y. 2924)("While the Non-Disparagement Clause provides a carve-out for the parties to respond truthfully to any inquiries

from a court or government entity, pursuant to a subpoena or as otherwise required by law, it does not permit Plaintiffs to make truthful statements outside of such inquiries."); *Symphony FS Ltd. v. Thompson*, 2018 U.S. Dist. LEXIS 178009 (E.D. Pa. 2018)(denying motion to quash a subpoena of otherwise confidential information under rules that provided for confidentiality "unless otherwise required by law or judicial decision.")

If, as held here, the subpoenas were properly issued, they represent demands that are "otherwise required by law."

b) Denver Labor has offered adequate guarantees of the confidentiality of the entertainers personal information.

THE CLUBS RELY ON THE ENTERTAINERS' interest in privacy to assert that the balance of interests in this case weighs against their disclosure of the entertainers' identities or contact information. While a legitimate concern, Denver Labor has a legitimate response. It has internal procedures for keeping personal information confidential and does not even disclose that information in response to a CORA request. (DL0047, DL0084) Governmental bodies receive and protect confidential information on a regular basis, and the assumption that Denver Labor would fail in this respect is unsupported in this record. The entertainers (or, at least, some portion of them – there is no record on this) already submit similar information to receive licensing as exotic dancers, and there is no basis for concluding that those records are more private than the ones that would be in the hands of Denver Labor[10].

[10] The Clubs argued that the applications the entertainers file with the Excise and License Board are not evidence that they consent to disclosure to Denver Labor, and I agree with that. I rely on those applications only as set out above.

c) The confidentiality of the asserted license agreements puts waiver of confidentiality in the hands of the Clubs, not the entertainers.

THE CONFIDENTIALITY CLAUSE IN THE ASSERTED LICENSE AGREEMENTS recognizes the privacy interests of the entertainers, but states that all the confidential information identified in the clause can be disclosed with the "express written consent of Licens**or**" i.e., the Clubs. In oral argument, when asked to address the actual language of the confidentiality provision (as they offered it), the Clubs made the distinctly peculiar argument that the language upon which they themselves rely is irrelevant and beyond the scope of the hearing.

They are the parties that rely on that language. They are the ones that put the language into evidence (at least, in their own briefs) and if (as counsel may have been asserting), that language isn't the **most** relevant portion of the agreements, they are the ones who limited their argument to that. With that, although the meaning of this provision as a whole is murky, it doesn't offer quite the support to the Clubs that they claim: They assert that they don't have to respond to the subpoenas because **they** withhold their consent. Which means, conversely, that they could **give** their consent.

This is not a main support for my decision – the language is, indeed, murky. But it is problematic for the Clubs effectively to assert that they have a **contractual** obligation to refuse to comply with Denver Labor's investigation because they can comply only with their own consent. Another possible reading of the language is that it is intended largely to protect the Clubs' own business records (like these license agreements) from unconsented disclosure by the entertainers.

It's a puzzlement, and one which counsel's insistence in oral argument that the language of the confidentiality clause isn't relevant because there are a lot of undisclosed portions of the agreements did nothing to clear up.

II. DENVER LABOR'S MOTION TO MODIFY THE SUBPOENAS

BASED UPON EXCHANGES during the August 22nd oral argument, I suggested that if I determined not to quash the subpoenas, they nonetheless could use modification and, following on that suggestion, Denver Labor included a motion to modify in its e-mail message of August 27th. Based on the language of §58-4(c)(3), I would have had the authority to do that without a motion, but appreciate the clarity that Denver Labor's message provides. I am therefore modifying the subpoenas in the following respects:

1. The time-scope of the subpoenas is limited to three years prior to Denver Labor's issuance of its initial notice letters to the Clubs. Those were sent to Evans Dining Services on May 3, 2023, Glenarm Dining Services on May 4, 2023, and Galena Dining Services on June 28, 2023.
2. In the first request, the term "lease" is removed.
3. The fourth request is removed entirely.[11]
4. The fifth request for the tip pooling policy is removed entirely.

The issuance of the modified subpoenas will be set at the date of their service, for purposes of time limits under the Ordinance. If Denver Labor wishes nonetheless to pursue any

[11] During the oral argument, counsel for Denver Labor conceded that this request was really in the nature of an interrogatory. I would have modified the subpoena to remove it, had Denver Labor not made its motion. I therefore do not address the Clubs' argument that this was improper discovery. It is gone.

penalties in relation to the initial subpoena service, that is an issue for another day.

It is therefore ordered that the Motion to Quash is denied, and the Motion to Modify is granted as set forth above.

Dated this September 3, 2024

/s/

Ellen M. Kelman

Hearing Officer