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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Virginia Van Dusen, et al., Plaintiffs, vs. Swift Transportation Co., Inc., et al., Defendants.	**No. CV 10-899-PHX-JWS** **PLAINTIFFS' MOTION TO COMPEL DISCOVERY RESPONSES**

Pursuant to Fed R Civ P 26 and 37 and LR CIV 7.2(j) and (k) and 37, Plaintiffs hereby move for an order compelling Defendants to respond to Plaintiffs' discovery requests. In accordance with LR CIv 7.2(j), a certification of counsel is attached hereto certifying that after personal consultation and sincere efforts to do so, counsel have been unable to satisfactorily resolve their discovery disputes. This motion is supported by the following Memorandum of Points and Authorities, the exhibits hereto and the record before this Court.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On July 22, 2014, this Court set a discovery schedule calling for discovery to be completed by April 10, 2015. Doc. 548. On October 3, 2014,[1] Plaintiffs called Defendants' attention to discovery Plaintiffs had already served but which had remained unanswered. Ex. A-D. To date, Defendants have objected to nearly every request. List of Disputes between the Parties, Ex. E hereto.[2] Defendants have frustrated this Court's schedule by refusing to participate in any meaningful discovery. The parties have held several meetings to try to resolve their discovery disputes, and both sides agree that no further progress can be made between them without the Court's intervention. *See* LR Civ. 7.2(j) Certification and emails attached hereto as Ex. F.

After the Ninth Circuit's mandate that this Court determine whether Plaintiffs are employees, the parties submitted various briefs on the scope of this Court's inquiry under Section 1 of the Federal Arbitration Act. Defendants argued that the Court should

[1] Discovery was delayed somewhat due to Defendants' repeated requests to the Court that discovery be limited to the contract and lease.

[2] Although there has been a complete failure to respond by Defendants and therefore no list required under LR Civ 37.1, for the convenience of the Court and because Plaintiffs voluntarily agreed during good faith discovery discussions to narrow some discovery requests, Exhibit E hereto sets forth a summary showing Plaintiffs' requests, Defendants' responses and objections and the reasons the responses are deficient..

resolve the exemption issue simply by "review[ing] the [Agreements]" because, in Defendants' view, "[n]o further briefing or evidence is required for the Court to make [the §1] determination." Doc 542 at 2. Defendants further argued that "the relevant question . . . is whether the ICOAs are contracts of employment when they were signed, not after," that "[w]hether an employer-employee relationship developed after the ICOAs were signed is a separate question . . . that should be decided by the arbitrator . . . ." *Id.* at 3. Defendants also argued that Plaintiffs' proposal improperly "ask[ed] the Court to resolve the merits of the case before determining whether it is appropriate to compel arbitration." *Id.* at 2-3.

In an Order entered July 21, 2014, the Court properly held that "plaintiffs' approach to what is required by the remand order is correct, while defendants' contention that the issue may be resolved on the basis of the existing papers lacks merit." Doc 546 at 2. The Court subsequently issued an order, entered July 22, 2014, setting forth a schedule for discovery and the trial of this matter. Doc 548.

Regarding the scope of issues for discovery and trial, this Court wrote:

> This case was remanded by the Court of Appeals with the following instruction: "On remand, the district court must determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA before it may consider Swift's motion to compel [arbitration]." (Doc. 534-3 at 2) If plaintiffs are or were employees, then § 1 would foreclose arbitration.
>
> In this court's original order requiring arbitration, **the court explained that, "resolving whether an employer-employee relationship exists would require an analysis of the Contractor Agreement as a whole, as well as the Lease and evidence of the amount of control exerted over plaintiffs by defendants." (Doc. 223 at 19) Indeed, to sort out whether an individual is an employee rather than an independent contractor generally requires consideration of numerous factors, including the employer's right to control the work, the individual's opportunity to earn profits from the work, the individual's investment in equipment and material needed for the work, whether the work requires a specialized skill, and whether the work done by the individual is an integral part of the employer's business.** *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979).

Order July 21, 2014, Doc. 546 (emph. added) (alterations in original). Despite the Court's rejection of the limited inquiry proposed by Defendants, Defendants have taken matters into their own hands[3] by simply refusing to supply discovery relevant to these "numerous factors." *Id.*

Plaintiffs served the following demands for discovery: First Request to Produce, Date 3/9/10, Ex. A; First Interrogatories, dated 3/9/10, Ex. B; Second Request to Produce (and Second Interrogatories), dated 10/20/14, Ex. C; and Third Request to Produce, dated 12/11/14, Ex. D.

Defendants have refused to answer almost every single request. To date, the only discovery Respondents have actually provided is 1446 pages consisting of 1312 pages of: 1) Department of Transportation ("DOT") logs (showing the hours worked) for Plaintiffs Schwalm, Motolinia, and Van Dusen; 2) Termination letters for Plaintiffs Wood, Schwalm, Van Dusen, Motolinia, and Sheer; and 3) Contracts, Leases and associated documents for Plaintiffs Sheer and Van Dusen. These limited documents were not provided until January 12, 2015, months after they were due.

But the real problem is that Defendants refuse to provide discovery that clearly is relevant to this case, objecting on relevance grounds to almost every request even though their arguments that Section 1 exemption issue should be confined to the language of the agreements has been repeatedly rejected. See Doc. 548, 605, 622. They have also

[3] In addition to refusing discovery, Defendants filed a motion asking the Court to "determine the section 1 exemption issue without resort to discovery and trial, and to stay proceedings, including discovery, pending resolution of the section 1 exemption issue." Doc 566 at 1. That motion was, in all but name only, a motion to reconsider the Court's July 21, 2014 Order rejecting Defendants argument that the Section 1 exemption be determined from the four corners of the ICOA and was properly denied by the Court on January 22, 2015, Doc. 546. *See* Doc. 605. *See also* Doc. 622 (denying Defendants' request to set aside scheduling and planning order and set briefing schedule where parties can make legal arguments as to why contracts are not employment contracts and characterizing it as a request for reconsideration).

repeatedly claimed undue burden without any evidence or support. Among the many subjects of documents and information Defendants have refused to supply in discovery include documents and information concerning: the instructions it sends to drivers through the onboard Qualcomm device; the job duties of Plaintiffs; documents concerning the routing of Plaintiffs; disciplinary actions taken against Plaintiffs; GPS tracking of drivers; personnel manuals and policies applicable to employee drivers and ICOA drivers; speed governors whereby Defendants control the speed Plaintiffs drive; mid-term contract changes Defendants have demanded ICOA drivers sign; terminations of ICOA drivers; correspondence and legal proceedings filed against drivers who Defendants terminate; DAC Report entries hindering drivers' ability to work for other companies; credit agency filings regarding drivers; documents and information regarding the purpose of any contract language; and changes to contract terms. *See* Ex. E hereto.

Plaintiffs' requests are relevant to determining employment status. Each of these topics are clearly relevant to the determination of whether Plaintiffs are contractors or employees. Continued delay and/or failure to produce the requested discovery will effectively frustrate Plaintiffs' ability to have the issues under consideration tried. Defendants' objections lack merit and should be rejected. Defendants have not established any burden at all, much less an undue burden.

ARGUMENT

A. Plaintiffs' Requests Are Relevant to the Issues to be Tried.

As set forth in Plaintiffs' Local Rule 37.1 Discovery Designations in Support of Motion to Compel, Ex. E hereto, Plaintiffs' discovery requests seek information that is relevant and necessary to evaluate whether Plaintiffs are employees under the Federal Arbitration Act.

As this Court has already ruled, an analysis of whether Plaintiffs are employees as opposed to independent contractors does not depend upon labels contained in the

contracts, and requires review of many facts outside the contracts at issue. *See Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 755 (9th Cir. 1979):

> The courts have identified a number of factors which may be useful in distinguishing employees from independent contractors for purposes of social legislation such as the FLSA. Some of those factors are:
>
> 1) the degree of the alleged employer's **right to control** the manner in which the work is to be performed;
> 2) the alleged employee's **opportunity for profit or loss** depending upon his managerial skill;
> 3) the alleged **employee's investment in equipment or materials** required for his task, or his employment of helpers;
> 4) whether the **service rendered requires a special skill**;
> 5) the **degree of permanence of the working relationship**; and
> 6) **whether the service rendered is an integral part of the alleged employer's business**.
>
> The presence of any individual factor is not dispositive of whether an employee/employer relationship exists. Such a determination depends "upon the circumstances of the whole activity."

Real, 603 F.2d at 754-55 (fn omitted, emph. added).

In the trucking context, contractor misclassification requires a wide-ranging inquiry into many factors. For example, the Ninth Circuit in *Ruiz v. Affinity Logistics* reversed a District Court's finding that truckers were contractors rather than employees, by a detailed review of the record, looking at a wide variety of factors many of which are the subject of Plaintiffs' discovery requests:

> Affinity had the right to control the details of the drivers' work, … Affinity controlled the drivers' rates, schedules, and routes. … Affinity set the drivers' flat "per stop" rate; the drivers could not negotiate for higher rates, as independent contractors commonly can. ... Affinity decided the days drivers worked, and retained the discretion to deny drivers' requests for days off. Affinity determined routes, and instructed drivers not to deviate from the order of deliveries listed on the route manifests … Affinity also controlled the equipment—the trucks, tools, and mobile phones—and the helpers the drivers used. … Affinity controlled the appearance of the drivers by requiring that drivers wear uniforms and by prohibiting drivers

from wearing earrings, displaying tattoos, and sporting certain designs of facial hair. … Affinity also closely monitored and supervised its drivers. … Affinity required drivers to report to the warehouse, where Affinity had several offices, and attend the stand-up meeting. … Affinity continued to monitor the drivers by inspecting their appearance and loading of their trucks; conducting "follow-alongs"; requiring that drivers call their Affinity supervisor after every two or three stops; monitoring the progress of each driver on the "route monitoring screen"; and contacting drivers if Affinity noticed drivers were running late or off course. Finally, the provisions of the ITA and the Procedures Manual demonstrate that Affinity retained the right to control its drivers. The ITA sets out the drivers' rate of pay, allows Affinity to terminate drivers without cause with sixty days notice, and allows Affinity to transfer drivers to other locations. And, as the district court recognized, the guidelines contained in the Procedures Manual "were more than mere 'suggestions.' " The Procedures Manual outlined the above-described procedures that Affinity required its drivers to follow, including wearing uniforms, loading trucks, delivering goods, and reporting to Affinity after deliveries. … the drivers could hire helpers and secondary drivers. But the district court overlooked the fact that often the reason drivers hired helpers was that they were required to do so by Affinity. Further, like defendant FedEx in Estrada, Affinity retained ultimate discretion to approve or disapprove of those helpers and additional drivers. ... While the district court found that approval was largely based upon neutral factors, such as background checks required under federal regulations, it is still true that the drivers did not have an unrestricted right to choose these persons, which is an "important right[ ] [that] would normally inure to a self-employed contractor." … Although Affinity did not require their drivers to obtain additional drivers, the testimony at trial indicated that the impetus for doing so came from Affinity whenever it had additional need for such drivers, rather than any desire by the drivers to profit from such hiring. Moreover, any additional drivers were subject to the same degree of control exerted by Affinity over the drivers generally. … While "purporting to relinquish" some control to the drivers by making the drivers form their own businesses and hire helpers, Affinity "retained absolute overall control" over the key parts of the business. …

Affinity retained absolute control over drivers' rates, payment, routes, schedules, trucks, equipment, appearance, decision to hire helpers, choice of helpers, and the right to deal with customers. … Affinity regulated many details of the drivers' work, including working conditions and the manner in which drivers made their deliveries.

B. Secondary Factors

….(1) Distinct occupation or business: Although the district court

recognized that the drivers would not have formed their own businesses in the absence of Affinity's requirement that they do so, the district court stated that "[r]egardless of the motive for forming their businesses ... Plaintiffs ultimately had the ability to expand their businesses by hiring more employees, operating multiple trucks, and making managerial decisions regarding the employment and performances of the employees hired." The district court clearly erred by not giving enough weight to the fact that Affinity required drivers to create these businesses as a condition of employment. Affinity even helped drivers set up the businesses by filling out necessary paperwork. Moreover, in the real world, these businesses were in name only. The drivers' only business was with Affinity because the drivers could not use their trucks for any purpose other than their work for Affinity. Affinity admitted that it "strongly discouraged" drivers from removing trucks from the warehouse lot overnight or on weekends. And, as the district court found, "Affinity would on occasion allow other drivers to use their trucks to make deliveries on days the drivers were not operating their trucks themselves. Plaintiffs were not compensated for this use."(2) Work under principal's direction or by specialist without supervision: The district court emphasized that the drivers' work included not only driving but also the delivery and installation of the appliances, and that the delivery and installation work "requires substantial skill" and was unsupervised. But in hiring drivers, Affinity did not require special driving licenses or even any work experience; rather a driver simply had to have a driver's license, sign a work agreement, and pass a physical examination and drug test. … Moreover, as explained above, Affinity closely supervised the drivers' work through various methods. … (3) Skill required: As described above, the drivers' work did not require substantial skill. (4) Provision of instrumentalities, tools, and place of work: As the district court found, "[t]he delivery truck was the main tool [that] Plaintiffs used to conduct their business." This main tool was provided by Affinity. Affinity advanced the drivers' costs of leasing and maintaining their trucks, and deducted these advances from drivers' paychecks. Affinity also required that drivers use a specific type of mobile phone, provided the drivers with these phones, and deducted the associated monthly costs from drivers' paychecks. The district court recognized these leasing and cost-advancing arrangements, but reasoned that under these arrangements the drivers furnished their own tools because they ultimately paid for them. We find this conclusion to be clearly erroneous. Affinity supplied the drivers with the major tools of the job by encouraging or requiring that the drivers obtain the tools from them through paid leasing arrangements. Moreover, the drivers did not own the trucks or cell phones, but only leased them from Affinity to perform their work for Affinity.(5) Method of payment: As the district court found, the drivers were paid per delivery. (6) Parties' belief: Ruiz and Affinity understood their relationship to be an independent contractor arrangement.

> As the California Court of Appeal has noted, however, "the parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship." … (7) Right to terminate at will: As the district court concluded, the parties' mutual termination provision is consistent with either an employer-employee or independent contractor relationship.(8) Work part of principal's regular business: Affinity, by its own definition, is an "experienced and competent home delivery contractor [that] desires to perform home delivery services." … As the district court recognized, Affinity's drivers perform those very home delivery services that are the core of Affinity's regular business. Without drivers, Affinity could not be in the home delivery business.(9) Length of time for performance of services: As the district court explained, "there was no contemplated end to the service relationship" when Affinity and the drivers signed their contracts, and drivers often stayed with Affinity for years. Because Affinity had the right to control the details of the drivers' work, and because the totality of the secondary factors weigh in favor of the drivers, … the drivers are employees of Affinity rather than independent contractors.

Ruiz v. Affinity Logistics Corp., 754 F.3d 1093, 1101-05 (9th Cir. 2014) *cert. denied*, No. 14-451, 2014 WL 5324355 (Dec. 15, 2014).[4] Similarly broad factual analyses were conducted by the Ninth Circuit in finding that FedEx delivery drivers are employees under Oregon and California common law. *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1042-46 (9th Cir. 2014) and *Alexander v. FedEx Ground Package Sys.*,

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[4] While this case analyzed employment under California's common law test in *S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, 403 (1989), the analysis of contractor/employee misclassification in all jurisdictions requires considering the same wide complex of factors. Arizona state courts also review a non-exhaustive list of general criteria:

> They include:
> 1. The extent of control exercised by the master over details of the work and the degree of supervision;
> 2. The distinct nature of the worker's business;
> 3. Specialization or skilled occupation;
> 4. Materials and place of work;
> 5. Duration of employment;
> 6. Method of payment;
> 7. Relationship of work done to the regular business of the employer;
> 8. Belief of the parties.

Santiago v. Phoenix Newspapers, Inc., 164 Ariz. 505, 509, 794 P.2d 138, 142 (1990).

Inc., 765 F.3d 981 (9th Cir. 2014). The discovery of similar factors here is proper.

As a general rule "any matter relevant to a claim or defense is discoverable." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (citing Fed.R.Civ.P. 26(b).). "Relevance for purposes of discovery is defined very broadly." *Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998) (citing *Hickman v. Taylor*, 329 U.S. 495, 506-07 (1947)). As the Supreme Court has made clear "discovery rules are to be accorded a broad and liberal treatment." *Hickman*, 329 U.S. at 507. *See also Bryant v. Armstrong*, 285 F.R.D. 596, 600 (S.D. Cal. 2012) ("Relevance is construed broadly to include any matter that bears on, or reasonably could lead to other matter that could bear on, any issue that may be in the case."). "No longer can the time-honored cry of 'fishing expedition,'" "serve to preclude a party from inquiring into the facts underlying his opponent's case." *Id.*[5] *See also Voggenthaler v. Maryland Square, LLC*, 2:08-CV-01618-RCJ, 2011 WL 112115, *8 (D. Nev. Jan. 13, 2011) ("An opponent's characterization of a discovery request as a 'fishing expedition' should not, however, prevent discovery of relevant and potentially admissible evidence in the possession, custody or control of the opposing parties. The requesting party is not required to demonstrate in advance that the sought-after information will ultimately prove his case or even that it will be admissible at trial. He is only required to make a threshold showing that the discovery is relevant and is calculated to lead to the discovery of admissible evidence.") (*clarified in part*, 1:08-CV-L618-RCJ-GWF, 2011 WL 902338 (D. Nev. Feb. 28, 2011)).

B. Defendants Have Not Established Any Undue Burden.

Although Defendants object that the discovery sought is unduly burdensome,

[5] Although the language of Rule 26(b)(1) was revised with the 2000 Amendments, the present standard is still "a very broad one." *See United Oil Co., Inc. v. Parts Associates, Inc.*, 227 F.R.D. 404, 409 (D. Md. 2005) (*quoting* 8 Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2008 (Supp. 2004).

Defendants fail to meet their burden of establishing any burden at all, let alone an undue burden. "[T]he party opposing discovery has the burden of showing that discovery should not be allowed and also has the burden of clarifying, explaining and supporting its objections with competent evidence." *Louisiana Pac. Corp. v. Money Mkt. 1 International Inv. Dealer*, 285 F.R.D. 481, 485 (N.D. Cal. 2012) (citing *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002)); *see also Nat'l Acad. of Recording Arts & Sciences, Inc. v. On Point Events, LP*, 256 F.R.D. 678, 680 (C.D. Cal. 2009) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). *See Bible v. Rio Properties, Inc.*, 246 F.R.D. 614, 619 (C.D. Cal. 2007) (citing, *inter alia*, *McLeod, Alexander, Powel & Apffel, P.C v. Quarles*, 894 F.2d 1482, 1485 (5th Cir.1990) (objections that document requests are overly broad, burdensome, oppressive, and irrelevant are insufficient to meet objecting party's burden of explaining why discovery requests are objectionable); *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir.1985) (conclusory recitations of expense and burdensomeness are not sufficiently specific to demonstrate why requested discovery is objection-able)).

Defendants have not produced any evidence nor cited any specific reasons that establish any undue burden that may be caused by having to respond to Plaintiffs' relevant discovery requests.[6]

CONCLUSION

Defendants should be compelled to respond to Plaintiffs' discovery requests as they have voluntarily narrowed them.

Respectfully submitted this 31st day of March, 2015.

Martin & Bonnett, P.L.L.C.

By: s/Jennifer Kroll

[6] As the Ninth Circuit has held, "legal memoranda and oral argument are not evidence." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrants:

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