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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Virginia Van Dusen; John Doe 1; and Joseph Sheer, individually and on behalf of all other similarly situated persons,

Plaintiffs,

v.

Swift Transportation Co., Inc.; Interstate Equipment Leasing, Inc.; Chad Killibrew; and Jerry Moyes,

Defendants.

Case No. CV 10-899-PHX-JWS

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY AND REQUEST FOR SANCTIONS

ORAL ARGUMENT REQUESTED

[Declaration of Paul Cowie filed concurrently herewith]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The scope of permissible discovery in this case has been narrowed to information that is material and necessary to determine whether the Contractor Agreements between Plaintiffs and Swift fall within the section 1 exemption of the Federal Arbitration Act ("FAA"). Yet Plaintiffs seek the same class-wide merits and certification discovery they sought prior to the issue being narrowed to the section 1 exemption, which was originally served in **2010** when the case was still venued in New York. This not only demonstrates that Plaintiffs' discovery is improper, it also confirms that Plaintiffs' true intent is to circumvent the Court's discovery order and fully litigate this case on the merits, negating any possibility for fact or issue determination by an arbitrator should the section 1 exemption not apply.

Since the Court narrowed discovery in July of last year, Plaintiffs have demanded response to literally **hundreds** of discovery requests, the vast majority of which seek information pertaining to the entire proposed class. Indeed, Plaintiffs' First Request for Production, which is the subject of this motion, contains more than 225 requests (including subparts) by itself. Plaintiffs have also served a Second, Third, Fourth, and Fifth Request for Production, a First and Second Interrogatory, and two 30(b)(6) deposition notices purporting to seek testimony across more than 200 different categories. ***Virtually all of Plaintiffs' requests seek information regarding drivers other than Plaintiffs***. Plaintiffs have blatantly ignored the Court's discovery order, driven up Defendants' costs, and deprived Defendants of one of the benefits of arbitration – speedy and cost effective resolution of claims. Plaintiffs should be admonished and sanctioned for their burdensome and harassing discovery tactics.

Notwithstanding Plaintiffs' abusive conduct, Defendants have produced nearly 1500 pages of documents, including all documents relevant to the issue of whether the parties' Contractor Agreements fall within the section 1 exemption. Defendants have no desire to hide the ball. By contrast, Plaintiffs seek nothing more than to harass Defendants

and trample their rights under the arbitration agreements between Plaintiffs and Swift. Notably, after the parties engaged in meet and confer efforts regarding the scope of discovery the result of which was that Defendants produced documents, Plaintiffs did not contact Defendants about any alleged deficiencies. Instead, Plaintiffs proceeded to file this Motion without any further meet and confer. This is improper and sanctionable. The Court should deny Plaintiffs' motion in its entirety.

II. RELEVANT FACTUAL BACKGROUND

The sole issue before this Court is whether Plaintiffs are required to pursue their claims in arbitration pursuant to the Contractor Agreements they signed with Swift. On November 4, 2013, the Ninth Circuit held that "the district court must determine whether the Contractor Agreements ***between each [plaintiff] and Swift*** are exempt under § 1 of the FAA before it may consider Swift's motion to compel [arbitration]." *Van Dusen v. Swift Transportation Co.*, 2013 U.S. App. LEXIS 22540 (9th Cir. 2013) (emphasis added). In response to the Ninth Circuit's ruling, this Court issued an order on July 21, 2014 permitting limited discovery focused solely on the issue of whether the Contractor Agreements are exempt. (*See* Doc. No. 546.) After this discovery is complete, the Court intends to conduct a summary trial on this issue – and only this issue – under section 4 of the FAA.[1] (*See id.*; *see also* Doc. No. 605.)

Plaintiffs have completely ignored the Court's discovery order. Following the order, Plaintiffs renewed the First Request for Production served by Plaintiffs Van Dusen and Sheer in March 2010, which seeks documents pertaining to ***all*** Swift drivers, and propounded additional class-wide discovery. In total, Plaintiffs' discovery included five sets of requests for production with more than 320 requests (including subparts), and two sets of interrogatories containing at least 20 interrogatories. (Cowie Decl., ¶ 2, Exhs. 1-6.)

[1] Defendants have sought appellate review of the Court's orders in this regard, and on February 26, 2015 filed a request to stay this matter pending appellate review. As of the date of this filing, the Ninth Circuit has not ruled on Defendants' request for a stay.

Plaintiffs also served deposition notices pursuant to Federal Rule of Civil Procedure 30(b)(6), demanding that Swift and Interstate Equipment Leasing produce their PMKs. Including subparts, these deposition notices contain 168 and 63 proposed categories of testimony, respectively. (*Id*., Exhs. 7-8.)

Even a cursory review of Plaintiffs' voluminous discovery demonstrates that Plaintiffs made no effort whatsoever to limit their discovery to the issue of whether ***Plaintiffs'*** Contractor Agreements fall under the section 1 exemption. The vast majority of Plaintiffs' discovery requests seek information regarding drivers ***other than Plaintiffs***. (Cowie Decl., ¶ 2, Exhs. 1-6.) Whether any other individual's Contractor Agreement is exempt is irrelevant at this stage. Moreover, the notion that a party should be forced to respond to literally hundreds of discovery requests is entirely inconsistent with the type of summary proceeding contemplated by section 4.

Notwithstanding the abusive and improper nature of Plaintiffs' discovery, Defendants responded to every one of Plaintiffs' requests. (Cowie Decl., ¶ 3, Exhs. 9-15.) Plaintiffs' claims to the contrary are false. (*See* Pls.' Mot., fn. 2 ("there has been a complete failure to respond by Defendants and therefore no list [is] required under LR Civ 37.1").) Indeed, Defendants produced nearly 1500 pages of documents in response to Plaintiffs' requests. (Cowie Decl., ¶ 3.) Defendants unequivocally complied with their discovery obligations.[2]

[2] If any party is guilty of ignoring its discovery obligations, it is Plaintiffs. Defendants served discovery on Plaintiffs on December 31, 2014. (Cowie Decl., ¶ 4.) Plaintiffs did not respond until March 19, 2015, more than two months later, and only after Defendants sought a response. (*Id*.) Plaintiffs therefore waived any objections to Defendants' discovery. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992). Despite waiving all objections, Plaintiffs failed to provide a single substantive response to Defendants' interrogatories. (*See* Cowie Decl., ¶ 4, Exh. 16.) Counsel for the parties are currently engaged in meet and confer regarding Plaintiffs' deficient responses. (Cowie Decl., ¶ 4.) Indeed, it appears this Motion was filed in response to Defendants pointing out that Plaintiffs had failed to respond to discovery at all.

Significantly, Plaintiffs failed to meet and confer in good faith prior to bringing this motion. Plaintiffs' claim that "[t]he 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." (Pls.' Mot., p. 2:16-18.) This is untrue, and Plaintiffs' own evidence demonstrates as much.[3] Plaintiffs' evidence shows that the last communication between the parties was in December 2014 – over three months before Plaintiffs filed their motion. (Pls. Mot., Exh. F.) In the last substantive email between the parties, Defendants' counsel stated, in pertinent part:

> [Y]our continued refusal to provide any explanation for why you believe documents are relevant makes it difficult to … commit to resolving all issues. Unless and until we know Plaintiffs' position regarding the relevant issues, we cannot reasonably respond. It is untrue to claim you have spent "hours speaking with [us] about this production" or that you have meaningfully narrowed your requests, which remain in excess of 150, not including the many subparts. Defendants have not refused to produce a single document, but as stated in our written responses, Defendants shall produce those documents indicated. It is clear that your correspondence is intended to create the appearance of meet and confer efforts, wherein reality you are not prepared to engage in a meaningful discussion of why class-wide documents are appropriate to resolve the section 1 exemption.

(*Id.*) Plaintiffs' counsel never bothered to respond to this email – and certainly never attempted to refute defense counsel's claims.[4] This is a tacit admission that defense counsel's claims are absolutely true.

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[3] Plaintiffs also falsely claim that Defendants' September 24, 2014 Motion to Determine Appropriate Standard For Resolution of the Section 1 Exemption Issue "was, in all but name only, a motion to reconsider the Court's July 21, 2014 Order…." (Pls.' Mot., n.3.) Plaintiffs made this same claim months ago, and it was summarily rejected by the Court. (*See* Doc. No. 605, p. 4:13-21.)

[4] In a subsequent telephone call, the parties discussed some of Plaintiffs' requests, but Plaintiffs' counsel did not dispute any of the claims in defense counsel's December 18, 2014 email, nor did Plaintiffs' counsel make any attempt to explain "why class-

In short, Plaintiffs are simply flouting the Court's discovery order. Plaintiffs seek nothing more than to drive up Swift's attorneys' fees and deprive Swift of its right to litigate Plaintiffs' claims on an individual basis in arbitration. Plaintiffs' motion should be denied its entirety.

III. ARGUMENT

A. The Scope Of Permissible Discovery Is Exceedingly Narrow

As noted above, and consistent with the Ninth Circuit's mandate, discovery is limited solely to the issue of "whether the Contractor Agreements ***between each [plaintiff] and Swift*** are exempt under § 1 of the FAA." *See Van Dusen*, 2013 U.S. App. LEXIS 22540 (emphasis added). Significantly, this does not necessitate a common law analysis of the employment relationship between the parties. The case law requires the district court to look to the intention of the parties at the time they formed the contract in interpreting the Contractor Agreements. *Sony Computer Entm't Am., Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008). In fact, courts have consistently looked to the terms of the parties' contract, and nothing else, to resolve the issue of whether the exemption applies. *Port Drivers Fed'n 18, Inc. v. All Saints Express, Inc.*, 757 F. Supp. 2d 463, 472 (D.N.J. 2011) *citing Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co.*, 288 F. Supp. 2d 1033 (D. Ariz. 2003); *Owner-Operator Indep. Drivers Ass'n, Inc. v. United Van Lines, LLC*, 2006 U.S. Dist. LEXIS 97022 (E.D. Mo. 2006).

Indeed, section 1 does not use the word "employee" at all. Instead, under the express words of the statute, the section 1 exemption applies only where there is a "contract of employment." Nowhere in section 1 does it reference "employee" or an "employment relationship." It is strictly a contractual analysis. This is why the Ninth Circuit found the issue is a "threshold" one. *See id*. And, regardless of the labels used in the Contractor Agreements, the terms of the Agreements themselves are sufficient to answer any inquiry about "numerous fact-oriented details, such as the [alleged] employer's

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wide documents are appropriate to resolve the section 1 exemption." (Cowie Decl., ¶ 5.)

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 [alleged] employer's business." (*See* Doc. No. 605, p. 5:15-20.)

All that said, even if the Court determines that the Contractor Agreements are not sufficient to answer such questions, Plaintiffs certainly are not entitled to full class-wide merits discovery, which is precisely what they seek. Plaintiffs' discovery is grossly overbroad and Plaintiffs' motion should therefore be denied.

B. <u>The Documents Plaintiffs Seek Are Well Outside The Limited Scope Of Permissible Discovery</u>

Notwithstanding the narrow scope of discovery, Plaintiffs seek virtually all documents used by Defendants in the operation of their respective businesses, with no regard to the burden imposed and no explanation as to how such documents are relevant. For example, Plaintiffs seek "documents and information concerning[] the instructions [Swift] sends to drivers through the onboard Qualcomm device." (Pls.' Mot., p. 5:3-4.) But Swift has thousands of drivers nationwide, and it sends Qualcomm messages to each of them on a daily basis. For some of Plaintiffs' claims, the proposed class period goes back to December 22, 2003, and it goes back to December 22, 2006 for all other claims. Accordingly, Plaintiffs' request for "documents and information concerning" any and all Qualcomm messages would, by itself, entail production of ***millions*** of pages of documents. Plaintiffs offer no explanation whatsoever regarding the relevance of this data. Instead, they rely on their boilerplate claim that "contractor misclassification requires a wide-ranging inquiry into many factors," and expect the Court to sort out the details. This is wholly insufficient to demonstrate entitlement to these documents. *See Soto v. City of Concord*, 162 F.R.D. 603, 610 (N.D. Cal. 1995) ("in general the party seeking to compel discovery bears the burden of showing that his request satisfies the relevance requirement of Rule 26"); *Best Buy Stores, L.P. v. Manteca Lifestyle Ctr., LLC*, 2011 U.S. Dist. LEXIS 62817, *10 (E.D. Cal. June 13, 2011) (same).

Similarly, Plaintiffs seek "documents and information concerning[] … GPS tracking of drivers," and "speed governors whereby Defendants control the speed Plaintiffs drive." (Pls.' Mot., p. 5:3-8.) But, again, Plaintiffs offer no explanation how such documents are relevant. It certainly is not obvious how "tracking" a truck or setting a maximum speed for that truck would magically convert the driver into an employee. Accordingly, Plaintiffs have not carried their "burden of showing that [such documents] satisfy[y] the relevance requirement of Rule 26." *Soto*, 162 F.R.D. at 610.

Most fundamentally, Plaintiffs seek a variety of "documents and information" regarding drivers ***other than themselves***. (*See, e.g.*, Pls.' Mot., p. 5:8-14 (indicating that Plaintiffs seek "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 filing regarding drivers").) Such "documents and information" are manifestly irrelevant to any determination whether ***Plaintiffs*** fall within the section 1 exemption. As defense counsel explained in the meet and confer correspondence attached to Plaintiffs' motion as Exhibit F:

> Plaintiffs' discovery is not appropriately focused on the section 1 determination, as evidenced by the fact that [Plaintiffs] simply regurgitated the same overblown discovery originally served when the case was purportedly proceeding as a class action. Despite [defense counsel's] requests, Plaintiffs … failed to explain why they believe such expansive discovery is necessary to determine the section 1 exemption. By way of a simple example, [Plaintiffs] have not even attempted to explain why [their] request for production number three, which [they] "narrowed" to seek "only" form documents used throughout the United States for a period of ten years, will be instructive of whether Sheer and Van Dusen (the persons on whose behalf the discovery was served) were independent contractors or employees. Plaintiffs are approaching the section 1 exemption question as if this matter were proceeding to a class-wide trial without the need to seek class-certification. This approach conflicts with the very essence of the summary trial anticipated by the FAA….
> (Pls.' Mot., Exh. F at p. 3.)

Plaintiffs' discovery is improper and harassing. Plaintiffs have made no attempt to limit their discovery to relevant issues. Instead, they seek to frustrate and ignore this Court's order, interfere with any potential arbitrations, and bombard Defendants with irrelevant discovery, all without meeting and conferring in good faith. The breadth and nature of the documents Plaintiffs seek demonstrates (once again) why it is improper to permit full merits discovery when there has been no determination whether Plaintiffs' claims will be pursued in this action or in arbitration. For all these reasons, Plaintiffs' motion should be denied in its entirety.

C. Plaintiffs And Their Counsel Should Be Sanctioned For Their Tactics

If a motion to compel is denied, unless certain exceptions are present, the court "must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party … who opposed the motion its reasonable expenses incurred in opposing the motion, including attorneys' fees." Fed. R. Civ. P. 37(a)(5)(B).

Here, the imposition of sanctions is entirely warranted. First, Plaintiffs have flagrantly ignored the Court's discovery order. The Court has limited discovery to the issue of whether Plaintiffs' Contractor Agreements fall within the section 1 exemption, and excluded discovery pertaining to other drivers' Contractor Agreements. Yet discovery pertaining to other drivers' Contractor Agreements is precisely what Plaintiffs seek. (*See, e.g.*, Pls.' Mot., p. 5:8-14 (indicating that Plaintiffs seek "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 filing regarding drivers").) Disobeying a court order alone warrants the imposition of sanctions.

In addition, Plaintiffs blatantly misrepresent facts in their moving papers. Among other things, Plaintiffs falsely claim that Defendants "agree that no further progress can be made between [the parties] without the Court's intervention." (Pls.' Mot., p. 2:16-18.) Defendants never indicated such an agreement. To the contrary, defense counsel

specifically asked Plaintiffs' counsel to "engage in a meaningful discussion of why class-wide documents are appropriate to resolve the section 1 exemption." (*Id.*, Exh. F.) Plaintiffs' counsel refused to do so. Plaintiffs' misrepresentations, along with their counsel's failure to meet and confer in good faith, constitute an independent basis to impose sanctions.

Based upon all of this, Defendants respectfully requests that the Court award sanctions in favor of Defendants and against Plaintiffs and their counsel of record, Getman & Sweeney PLLC, in the amount of $3,500.00. This amount constitutes only a fraction of the attorneys' fees incurred by Defendants in opposing Plaintiffs' motion. (Cowie Decl. ¶ 6.) However, Defendants believe it is sufficient to discourage Plaintiffs and their counsel from engaging in this type of conduct again.

IV. CONCLUSION

For all the reasons discussed above, Defendants respectfully request that the Court deny Plaintiffs' motion in its entirety. The discovery Plaintiffs seek is manifestly improper, and violates the Court's previous order. Plaintiffs' clear purpose in bringing the motion is to deprive Swift of its right to litigate Plaintiffs' claims on an individual basis in arbitration. Plaintiffs and their attorneys should not be rewarded for such impermissible conduct.

Dated: April 14, 2015

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 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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