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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' REPLY TO MOTION TO COMPEL DISCOVERY RESPONSES

Swift continues to argue against what this court conclusively and repeatedly resolved against it. The Ninth Circuit directed this Court to determine the Section 1 exemption and that this exemption requires determining whether Plaintiffs are contractors or employees. To make this determination, Your Honor stated that Plaintiffs are entitled to discovery related to "numerous factors." Doc. 546.

> 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)(emphasis added).

Doc. 546. The consideration of whether truck drivers are contractors or employees is a highly fact specific determination. Ninth Circuit decisions on trucker misclassification are long, complex, and involve highly searching inquiry into the facts of the relationship. *See e.g. 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).[1] 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., Inc.*, 765 F.3d 981 (9th Cir. 2014).

And a similarly highly detailed analysis was performed by Your Honor in applying the *Real v. Driscoll Strawberry Associates, Inc.* test for misclassification in the

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

recent summary judgment decision involving truck drivers in *Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-CV-00824 JWS, 2015 WL 1299369, at *2 (D. Ariz. Mar. 23, 2015). Because the application of the *Real* factors are broad, but "non-exhaustive," *Id.*, the misclassification analysis here is broad and discovery must be commensurate with the scope of the issues before the Court.

Plaintiffs initially served broad discovery in 2010 before the inquiry was limited to misclassification. Swift refused to provide any documents in response. During months of meet and confers with Swift, Plaintiffs substantially narrowed their demands. At present, Swift has only agreed to provide 3 categories of documents:

a. 1312 pages of DOT logs for Plaintiffs that merely show the hours Plaintiffs worked;
b. termination letters for Plaintiffs; and
c. contracts, leases and the associated attached schedules for the five Named Plaintiffs.

Swift claims that it responded to "every one of Plaintiffs' requests. Def. Brf. p. 4. However, it fails to advise the Court it responded only by objecting to every such request and it has only provided documents in the three limited categories described above. Nevertheless, Plaintiffs have narrowed their demands by withdrawing and abjuring production on a great many demands. At this point, only 50 Requests are subject to motion to compel.[2] *See* Ex. E to Original Motion, Doc. 631-6.

Swift's claim that the drivers failed to meet and confer in good faith is belied by the actual history recounted in the opening brief showing that there were at least three telephonic conferences and extensive written correspondence. Many of these conferences lasted several hours. These facts are not disputed. Though Swift tries to suggest some avenue of discussion was left open, it was not. Despite months of delays

[2] Swift falsely claims that Plaintiffs are seeking discovery of 320 requests to produce and 20 interrogatories. *Def. Brf. p.3.* Plaintiffs withdrew or abjured most of their requests and seek to compel only 50 requests.

caused by Swift's refusal to comply with this Court's discovery order, the parties are at an impasse (and Swift suggests no intention to budge absent an Order compelling discovery).

Swift also claims that the drivers delayed moving to compel for three months. That delay, however, resulted from countless defense filings – the reconsideration motion Swift filed in this Court with respect to discovery scope (decided January 22, 2015), Swift's application to this Court to stay Your Honor's discovery plan, Swift's appeal to the 9th Circuit (notwithstanding that there is no final judgment and no order denying arbitration), Swift's mandamus petition to the 9th Circuit, and Swift's stay motion in the 9th Circuit. These reconsiderations, appeals and mandamus filings are frivolous, but burdensome and have required extensive further work by Plaintiffs to address. Plaintiffs have not slept on their rights.

Each of the 50 requests currently in dispute are relevant to the factors set forth in broad categories by this Court or by the caselaw on trucker misclassification:

1. The employer's right to control the work: RFP 1, Items 3, 4, 5, 8, 10, 12, 13, 14, 15, 16, 19, 22, 30, 31, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 48, 52, 53, 54, 56, 63, 64, 66, 71, 73, 76, 78, 79, 88, 96, 102, 128.
2. The individual's opportunity to earn profits from the work: RFP 1, Items 3, 4, 5, 8, 10, 12, 13, 14, 16, 17, 19, 22, 24, 30, 31, 35, 36, 38, 40, 41, 42, 43, 44, 45, 48, 52, 53, 54, 59, 63, 64, 66, 71, 73, 76, 78, 79, 88, 96, 102, 103, 128.
3. The individual's investment in equipment and material needed for the work: RFP 1, Items 3, 4, 5, 8, 10, 12, 15, 17, 19, 22, 24, 35, 43, 44, 45, 59, 64, 66, 71, 76, 78, 79, 88, 96, 102, 128.
4. Whether the work requires a specialized skill: RFP 1, Items 24, 35, 36, 37, 38, 128.
5. Whether the work done by the individual is an integral part of the employer's business: RFP 1, Items 24, 35, 36, 94, 97, 128.

Furthermore, the *Real* factors are "non-exhaustive" and any demands outside these explicit factors are nevertheless relevant to "the economic realities of the working relationship [and whether] the individual is dependent upon the business to which she renders service." *Collinge v. IntelliQuick Delivery, Inc.*, 2015 WL 1299369, at *2.

Swift's categorical refusal to provide documents, and its reargument of the discovery plan, notwithstanding the repeated rejection of its proposal to limit discovery and review of its practices, seek to avoid all meaningful discovery. Once again, Swift argues that discovery is limited to the terms of the agreements. Def. Brf. p.6. Yet this constricted reading of the discovery sweep was explicitly rejected by this Court in its discovery order, Doc. 546, Reconsideration Decision, Doc. 605, Stay Decision, Doc. 622. Defendant's position has been conclusively rejected and the Court's rulings are "law of the case." Respondent's refusal to provide discovery and reargument yet again, is thus frivolous and advanced in bad faith.

Again Swift argues that discovery may not overlap with factors relevant to the substantive determination of the case on the merits. Def. Brf. pp. 4, 7, 9. But when Swift presented this issue to the 9th Circuit on appeal, it was specifically rejected by that Court. Doc. 605 at pp. 7-8. Your Honor recognized that this argument has now been foreclosed by the Ninth Circuit. *Id.* At some point, Swift must recognize law of the case and not belabor what it has lost. The other defense arguments are equally meritless.

1. Documents About The Working Relationship

Swift argues that Plaintiffs seek documents pertaining to all ICOA drivers not just five named plaintiffs. But this obfuscates the real inquiry and the reason the demands are relevant. The misclassification analysis does not just look to a company's control of the putative employee, it looks to the company's "right to control" or "authority to control." *See* this Court's recognition of this principle in Doc. 546 as to *Real v. Driscoll*, factor #1 "the employer's right to control the work." *See also Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-CV-00824 JWS, 2015 WL 1299369, at *2 (D. Ariz. Mar. 23, 2015)

describing the inquiry into the "right to control." This authority or right of control may be shown by resort to ways in which the company treats other putative contractors.[3] In *Collinge,* this Court also noted that:

> Contractual language that purports to describe an individual's working relationship does not control, nor does the parties' intent. Instead, the economic realities of the working relationship are what matters. The court's ultimate focus is on whether, as a matter of economic reality, the individual is dependent upon the business to which she renders service.

Collinge v. IntelliQuick Delivery, Inc., 2015 WL 1299369, at *2. Because evidence of how Swift treats other drivers is evidence of the "economic realities of the working relationship," documents relating to the economic realities relate to the Plaintiffs. *Id.*

2. Qualcomm Instructions

Swift opposes production of its Qualcomm messages, claiming that this request seeks "millions of pages of documents." Def. Brf. Doc. 634, p.7. This is beyond deceptive; it is outright false. A Qualcomm is a satellite transmittal device allowing trucking companies to communicate its directions in writing with all its drivers while they are on the road. Swift sends drivers load instructions, route instructions, delivery requirements, contract changes, etc. Qualcomm messages are kept in a Qualcomm database file, very much equivalent to an Excel file. Thus, while there may be millions of "cells" of data in a database file such as Qualcomm, the data is not "millions of pages" and is obtained by a single data pull and export into Excel. The database of instructions is *key* evidence of control in this case. Swift seeks to hide key evidence in issue by overstating what is sought.

3. Swift's GPS Tracking of Drivers

Swift opposes data regarding its GPS tracking of Plaintiffs. GPS tracking of Plaintiffs shows that Swift monitors its ICOA drivers on a turn by turn basis. Indeed,

[3] For example, if Swift retains authority to approve or reject subcontractors, even though that authority never came into play with the named Plaintiffs, Swift's authority to control is still in issue and should be considered by the Court. Doc. 546.

Plaintiffs expect the GPS and Qualcomm databases together will show drivers do not have a contractor's freedom to get from here to there by their own means and that Swift enforces its own routing instructions minutely.

4. Swift's Exercise of Control Through Mechanical "Speed Governors"

Swift also opposes drivers' demands regarding Swift's imposition of "speed governors." – a mechanical device that limits engine RPMs and thus establish a company speed limit below federally posted limits. This is highly probative of Swift's control. Rather than the putative contractor deciding what speed to drive – for profitability, gas consumption, effective pay per hour – Swift controls key aspects of how drivers do their work for the company.

5. Swift's Control Evidenced By Mid-Term Contract Changes

Swift opposes providing documents of its imposition of mid-term contract changes. If Swift can change the terms of the contracts to its drivers' detriment at will, this fact is utterly demonstrative of the tremendous control Swift exercises over all ICOA drivers. In fact, it shows that the obligations flow disproportionately from the drivers to Swift and that any terms that displease Swift may simply be dispensed with. Swift's ability to exact mid-term contractual changes to its benefit also dovetails with the showing that Swift may terminate a driver's contract at any point a driver displeases it, with no consequence to Swift, but with devastating financial consequences to the driver. Together, these facts document the excruciating level of control Swift exercises over its ICOA drivers.

6. Swift's Control Through Collections Lawsuits

Swift opposes providing documents about legal proceedings it files against ICOA drivers, such as for collections against drivers' indebtedness which occurs during a lease and alleged "default."[4] These lawsuits, if they occur, will show several things. First, they

[4] Any time Swift terminates an ICOA driver, the contract defines termination into a lease default by the driver.

will show that Swift has extra-contractual control over drivers. Drivers considered to displease Swift may be placed into "default" at any point Swift desires, with or without giving a reason for terminating the lease. These documents will show that when Swift puts a driver in default, it also puts the driver into collections, which Plaintiffs expect to show, often results in a collections lawsuit. Second, though the contracts with ICOA drivers require either Swift or the drivers to bring any claims against the other in arbitration, such documents will show that Swift has so much power over drivers that it need not follow its own contract. Third, by demonstrating that Swift does not honor the arbitration agreement it seeks to impose on ICOA drivers, these documents will show an independent basis for refusing to impose an arbitration clause on the drivers. A company's failure to honor a supposedly bilateral arbitration agreement has been repeatedly found to invalidate an arbitration "agreement." *See e.g. United Computer Sys., Inc. v. AT & T Corp.*, 298 F.3d 756, 765 (9th Cir. 2002) ("arbitration rights are subject to constructive waiver if three conditions are met: (1) the waiving party must have knowledge of an existing right to compel arbitration; (2) there must be acts by that party inconsistent with such an existing right; and (3) there must be prejudice resulting from the waiving party's inconsistent acts."). If Swift has itself refused to honor the arbitration clause, its claim to compel FAA arbitration may be waived.

7. Negative DAC Reports Are A Key Control Device

Swift opposes having to provide documents concerning the negative DAC Reports which Swift files against drivers that displease it. DAC Reports are the trucking industry's tool to oversee and share the entire history of a driver's work in the industry. Companies which wish to have access to the reports about potential hires, must agree to make reports on their drivers. A negative DAC Report against an ICOA driver who is terminated, such as an entry of "LEASE DEFAULT" may find they can never be hired by another company. Thus, the threat of putting a driver in default for any non-compliance with Swift's rules is evidence of Swift's extra-contractual control over drivers. Negative

DAC Reports evidence this extra-contractual control Swift exercises over its drivers. "Upon information and belief, the U.S. commercial industry routinely uses the DAC Report for pre-employment screening." *Second Am. Cplt.* ¶ 105. "Upon information and belief, loss of good credit or DAC Report status can prevent a driver from getting a job within the trucking industry." *Id.*

8. Plaintiffs Should Not Be "Sanctioned" And Swift Should Pay Fees Under Rule 37(a)(5).

Plaintiffs and their Counsel should not be "sanctioned" in the amount of $3,500 as Swift contends. Any sanctions should be awarded the other way. Defendants' specious request for sanctions is completely unwarranted. Plaintiffs' demands are wholly appropriate to the wide range of issues before the court. As set forth above, Plaintiffs' demands are all directly relevant to the myriad topics repeatedly specified by this Court as necessary to make the determination the Ninth Circuit has tasked it with making. As such, Defendants' accusations that Plaintiffs have somehow "flagrantly ignored the Court's discovery order" are completely baseless and serve to mask Swift's failure to comply with this Court's discovery order. If anything, it is Defendants' conduct that is sanctionable in this case. In their opposition, Defendants once again make arguments that they have presented incessantly to this Court and the Ninth Circuit and which this Court and the Ninth Circuit have consistently rejected and which are thus "law of the case." The reassertion of arguments which have been resolved numerous times is in bad faith and sanctionable. Furthermore, fees "must" be awarded here under Fed. R. Civ. P. Rule 37(a)(5)(a), since "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees."

CONCLUSION

The drivers' motion to compel should be granted.

Respectfully submitted this 24th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 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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