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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' OPPOSITION TO DEFENDANTS' MOTIONS TO COMPEL DISCOVERY RESPONSES AND REQUEST FOR SANCTIONS IN THE AMOUNT OF $7,500**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Plaintiffs oppose Defendants' Motions[1] to Compel Discovery Responses and Request for Sanctions in the Amount of $7,500 (Docs. 646 and 649). First Plaintiffs have not waived their objections to Respondents' irrelevant and overbroad discovery requests. As explained repeatedly to Respondents, Plaintiffs' negligibly late responses were due to an inadvertent administrative calendaring error, and Respondents cannot identify any bad faith whatsoever on Plaintiffs' part. Indeed, as soon as Plaintiffs were made aware of the outstanding discovery responses, they immediately asked Respondents for an extension and provided responses within two days. As Respondents had two motions for a stay of all discovery pending at the time Plaintiffs asked for the extension, and as Respondents had not yet moved to compel discovery responses at that point, Respondents have not been prejudiced in anyway because of Plaintiffs' marginally late responses.

Second, Defendants' Interrogatories and Requests for Production ("RFPs") are so vastly overbroad and are not relevant to the limited issue of whether Plaintiffs are exempt under § 1 of the Federal Arbitration Act ("FAA") as to be unduly burdensome. Most notably, many of Respondents' Interrogatories and RFPs demand that Plaintiffs provide information and documents regarding all allegations in the Third Amended Complaint ("TAC"). These requests are not narrowly tailored to § 1 issue, as the TAC raised more than just the issue of whether Plaintiffs were employees or independent contractors. Among other things, the TAC asserts that the contracts Plaintiffs signed with Defendants were unconscionable and that Defendants obtained the continuous labor of Plaintiffs by

[1] The instant memorandum is in opposition to both Swift Transportation Co., Inc.'s ("Swift") and Interstate Equipment Leasing, Inc.'s ("IEL") motions to compel. For the reasons set forth in Section I.E. below, a memorandum on behalf of all Plaintiffs in opposition to the motions of all Defendants is both proper and desirable. Indeed, the filing of the *same exact motion* for each Swift and IEL is a waste of this Court's and the parties' time and resources.

using threats of serious harm. Clearly these allegations in the TAC are not related to the issue of whether Plaintiffs are exempt under § 1 of the FAA. Thus Defendants' discovery requests demanding that Plaintiffs provide information and documents regarding all allegations in the TAC is not narrowly tailored. Likewise, Swift's RFP No. 57, which requests documents that describe Plaintiffs' intent as to the type of relationship created (independent contractor or employment) at the time that they signed the contract with Defendant, is unrelated to the § 1 issue. Your Honor recently reaffirmed in *Collinge v. IntelliQuick Delivery, Inc.*, that "[c]ontractual language that purports to describe an individual's working relationship does not control, **nor does the parties' intent**."

Finally, contrary to Defendants' assertions, Plaintiffs have participated in the discovery process in good faith. First, Plaintiffs have agreed to numerous and lengthy extensions for Defendants' responses to Plaintiffs' discovery requests rather than immediately declaring that Defendants have waived any objections. For example, Plaintiffs agreed to a two-week extension on Defendants providing discovery responses to Plaintiffs' first set of discovery requests, even when such responses were already *several months* late. And in fact Defendants have asserted many late objections to Plaintiffs' discovery requests. Defendants refused to supplement their responses and Plaintiffs were forced to move to compel responses to their discovery requests, which Your Honor granted. As previously stated, Plaintiffs' late discovery responses were due to an administrative calendaring error and Plaintiffs quickly provided their responses after being notified of the outstanding discovery. After extensive written correspondence between the parties where in Plaintiffs repeatedly asserted that they had waived any objections to Defendants' discovery requests and would not be providing supplemental responses that omitted any objections, Defendants stated that they would move to compel, even though the parties had not met and conferred as required by this

Court's rules. Plaintiffs did not fail to provide substantive responses for over five months, as Defendants assert. It was Defendants who waited three months to contact Plaintiffs to schedule a meet and confer regarding Plaintiffs' responses.

In the phone call between Robert Mussig, Defendants' counsel, and Lesley Tse, Plaintiffs' counsel, to schedule a meet and confer between the parties regarding the discovery requests at issue in this motion and Plaintiffs' 30(b)(6) deposition notices for Swift and IEL, Mr. Mussig stated that Defendants were not interested in going through each of Plaintiff's responses separately, rather Defendants just wanted to know which responses Plaintiffs were willing to revise. Similarly, he stated that Defendants were not interested in going through each topic in the notices separately, but instead insisted that Plaintiffs just withdraw the entire notices and redraft them. Plaintiffs then prudently drafted their motion to compel regarding the 30(b)(6) depositions ahead of the parties' meet and confer in anticipation of Defendants' refusal to discuss each topic individually. Simply because Plaintiffs drafted their motion in advance to file immediately after meet and confer does not mean that they did not meet and confer in good faith. Had Defendants changed their minds and been willing to go through each topic separately and perhaps allowed the parties to agree on some topics and to narrow others, Plaintiffs would have revised their motion prior to filing to reflect this. As Defendants were not willing to do this, Plaintiffs immediately filed their motion as originally drafted, and as they unfortunately foresaw.

For these reasons, and for the reasons set forth in detail below, Respondents Motion to Compel should be denied in its entirety.

BACKGROUND

On December 31, 2014, Defendants served Plaintiffs with Interrogatories and Requests for Production ("RFPs") via email and mail. (Declaration of Lesley Tse ("*Tse Decl.*") at ¶ 2. Due to an inadvertent administrative calendaring error,

Plaintiffs did not provide responses to the discovery requests by February 2, 2014. *Tse Decl.* at ¶ 3. On March 17, 2015, Defendants' counsel sent Plaintiffs' counsel a letter regarding the outstanding discovery responses. *Tse Decl.* at ¶ 4; Doc. 648-2. Plaintiffs immediately requested an extension to provide their discovery responses. *Tse Decl.* at ¶ 5; Exhibit A. On March 19, 2015, two days after Defendants notified them of the outstanding discovery responses, Plaintiffs provided Defendants with their discovery responses. *Tse Decl.* at ¶ 6; Exhibit B; Docs. 648-3 and 648-4.

Plaintiffs then received correspondence from Defendants on March 23, 2015, asserting that Plaintiffs' objections had been waived and demanding that Plaintiffs provide supplemental responses to Defendants' discovery requests omitting any objections. *Tse Decl.* at ¶ 7; Doc. 648-5. Plaintiffs responded to Defendants on March 30, 2015, notifying them that they disagreed that they had waived any objections to Defendants' discovery requests and would not be providing supplemental responses that omitted any objections. *Tse Decl.* at ¶ 8; Doc. 648-6. Plaintiffs then provided responsive documents three days later on April 2, 2015, or approximately two weeks after being informed that their responses were outstanding.[2] *Tse Decl.* at ¶ 9; Exhibit C.

On April 2, 2015, Plaintiffs then received correspondence from Defendants again demanding that Plaintiffs supplement their discovery responses. *Tse Decl.* at ¶ 10; Doc. 648-7. Defendants stated in that correspondence that if Plaintiffs did not provide supplemental responses or respond to Defendants' correspondence by April 10, 2015, Defendants would move to compel, even though the parties had not met and conferred telephonically as required by this Local Rule 37-1. *Tse Decl.* at ¶ 11; Doc. 648-7. Defendants then waited three months until June 29, 2015 to contact Plaintiffs to schedule a meet and confer regarding Plaintiffs' responses. *Tse*

[2] Meanwhile, Plaintiffs are still waiting for the most basic documents in this case months after their demands were sent to Defendants.

Decl. at ¶ 12; Doc. 647 at ¶ 11.

In the phone call between Robert Mussig, Defendants' counsel, and Lesley Tse, Plaintiffs' counsel, to schedule a meet and confer between the parties regarding the discovery requests at issue in this motion and Plaintiffs' 30(b)(6) deposition notices for Swift and IEL, Mr. Mussig stated that Defendants were not interested in going through each of Plaintiff's responses separately, rather Defendants just wanted to know which responses Plaintiffs were willing to revise. *Tse Decl.* at ¶ 13. Similarly, he stated that Defendants were not interested in going through each topic in the notices separately, but instead insisted that Plaintiffs just withdraw the entire notices and redraft them. *Tse Decl.* at ¶ 14. Plaintiffs then prudently drafted their motion to compel regarding the 30(b)(6) depositions ahead of the parties' meet and confer in anticipation of Defendants' refusal to discuss each topic individually. *Tse Decl.* at ¶ 15. During the meet and confer held between counsel for the parties (Dan Getman and Lesley Tse for Plaintiffs, and Robert Mussig and Hilary Habib for Defendants,) on July 13, 2015, Defendants again stated that they were not interested in going through each of Plaintiff's discovery responses separately, and just wanted to know which responses Plaintiffs were willing to revise. *Tse Decl.* at ¶ 16. They also again stated broadly that they were objecting to Plaintiffs' 30(b)(6) topics as overbroad, unduly burdensome and seeking information not reasonably calculated to lead to discovery of admissible evidence, that they would not propose any narrowed topics that they would be willing to designate a corporate witness to testify about, and that Plaintiffs should withdraw their deposition notices in toto. *Tse Decl.* at ¶ 17. Plaintiffs then filed their Motion to Compel Defendants to Testify (Doc. 644). On July 17, 2015, Respondents filed their Motion to Compel Discovery Responses (Doc. 646).

ARGUMENT

I. PLAINTIFFS' HAVE NOT WAIVED THEIR OBJECTIONS TO RESPONDENTS' IRRELEVANT, OVERBROAD DISCOVERY REQUESTS

A. The Circumstances Here Do Not Warrant a Finding That Plaintiffs' Objections Have Been Waived Due to Minor Delay

Courts have broad discretion to grant relief, upon a showing of good cause, from waiver of an objection for failure to timely respond to a discovery request. *Batts v. Cnty. of Santa Clara*, No. C08-00286 JW (HRL), 2010 WL 1027990, at *1 (N.D. Cal. Mar. 18, 2010). Numerous courts in this circuit have held that untimely objections are not waived where the delay in response is not substantial, where the delay is inadvertent due to calendaring error, the other party has suffered no prejudice from the delay, the responding party has not demonstrated a pattern of misconduct that would warrant the relatively harsh sanction of waiver, the responding party requests an extension of time to respond to the discovery deadlines soon after learning of the lateness, and the other party has not moved to compel responses. *See e.g.*, *Karr v. Napolitano*, No. C 11-02207 LB, 2012 WL 1965855, at *6 (N.D. Cal. May 31, 2012) (defendant's late responses to discovery "caused by a simple calendaring error," did not constitute waiver of objections where plaintiff did not provide court with any reason to doubt defendant's explanation, plaintiff did not show that he had been prejudiced in any way by the delay, the court did not see how he would have been, and without any prejudice, the court believed that a complete waiver of defendant's objections would be a disproportionately harsh result); *Liguori v. Hansen*, No. 2:11-CV-00492-GMN, 2012 WL 760747, at *13 (D. Nev. Mar. 6, 2012) (court found untimely objections not waived where plaintiff's counsel requested extension within week of learning about expired deadlines and at the time counsel made the

request, defendant had not filed a motion to compel); *Batts*, 2010 WL 1027990, at *1 (discovery responses served two weeks late did not waive objections because "a waiver of all objections would be a draconian result that is not warranted under the circumstances presented here"); *Kanawi v. Bechtel Corp.*, No. C 06-05566 CRB (EDL), 2008 WL 4642168, at *1 (N.D. Cal. Oct. 17, 2008) (late responses due to calendaring error did not waive objections because defendant had not shown that it suffered prejudice from the short delay).

Even the cases cited by Defendants in support of their motion show that a party's delay in responding to discovery must be protracted, egregious and/or in bad faith in order for such delay to constitute a waiver of objections. *See, e.g.*, *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1471 (9th Cir. 1992) (district court found defendant's objections untimely because defendant raised objections for the first time in response to plaintiff's motion for contempt and discovery sanctions for defendant's previous repeated failures to respond whatsoever to discovery requests); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) (appellant first mentioned Fifth Amendment privilege fifteen months after interrogatories had been propounded, "long after he knew he was under investigation, long after he had been indicted in the state court, long after his trial at which he testified in his own behalf, and months after he had been convicted in the state proceeding"); *Alcalde v. NAC Real Estate Investments & Assignments, Inc.*, 580 F. Supp. 2d 969, 972 (C.D. Cal. 2008) (objections waived where judgment debtors failed to comply with court order to produce documents and had not raised objections more than 16 months after requests were served). Here, the circumstances warrant a finding that Plaintiffs' objections have not been waived.

B. Plaintiffs' Negligible Lateness Was Due to Inadvertent Administrative Error and Was Not in Bad Faith

Plaintiffs' discovery responses were late due to an inadvertent administrative

calendaring error. There was absolutely no bad faith on Plaintiffs' part and Defendants can point to none. In response to Defendants' correspondence on March 17, 2015 (received via email at 6:13pm Eastern Time) notifying Plaintiffs that their discovery responses were past due, Dan Getman immediately requested an extension to provide Defendants with Plaintiffs' responses to the discovery requests. *See* Exhibit A. Moreover, Plaintiffs quickly provided their responses a mere *two days* after being notified that the responses were past due. *See* Exhibit B. Finally, at the time Defendants notified Plaintiffs that their discovery responses were outstanding, Defendants had not yet moved to compel Plaintiffs' responses.

C. Respondents Are Not Prejudiced in Any Way by Plaintiffs' Marginally Late Responses, As They Have Repeatedly Moved for a Stay of All Discovery in This Case

As Defendants previously moved for a stay of all discovery in this case[3], in both the District Court and in the Ninth Circuit, Plaintiffs cannot see how there is any prejudice whatsoever to Defendants by Plaintiffs' minor and unintentional delay in providing discovery responses. If Defendants had had their way, absolutely no discovery would currently be proceeding. Indeed, "Defendant maintains that stay pending the outcome of the writ and appeal are appropriate." *See* Doc. 649-1 at p. 5, fn 1. Further, the deadline for all disclosures and discovery responses in this case is currently scheduled for September 9, 2015. Plaintiffs' responses to the discovery at issue here were well within that time. Indeed, Defendants have effectuated a far more egregious failure to participate in discovery by objecting to every interrogatory, every request to produce, every 30(b)(6) deposition topic, each of which has necessitated a motion to compel. *See* Docs.

[3] Defendant continues to argue, despite repeated decisions by this Court to the contrary, that the Federal Arbitration Act ("FAA") section 1 exemption should be decided without discovery and trial and moved for a stay of this proceeding while it appeals the issue to the Ninth Circuit Court of Appeals. Defendants' motions for a stay to this Court and to the Ninth Circuit were denied.

634-10 – 634-16, and 644-2. Defendants' discovery conduct has caused multiple delays of the briefing schedule on the Section 1 exemption; Plaintiffs' inadvertent delay on the other hand, has caused absolutely none. Finally, Defendants have not shown that they are prejudiced in any way by the negligible delay. The only prejudice Defendants claim they suffer is because of Plaintiffs' alleged "refusal to provide it with fundamental discovery into their claims," *see* Doc. 649-1 pp. 6-7, not in any way because of the minor delay in Plaintiffs' responses.

D. Respondents Themselves Were Significantly Late in Responding to Plaintiffs' Discovery Requests

Plaintiffs have not engaged in any pattern of misconduct but have instead participated in the discovery process in good faith; indeed Plaintiffs have agreed to numerous and lengthy extensions for Defendants' responses to Plaintiffs' discovery requests rather than immediately declaring that Defendants have waived any objections, *see*, *e.g.*, Exhibit D, wherein Plaintiffs agreed to a two-week extension on Defendants providing discovery responses, even when such responses were already *several months* late. And in fact Defendants have asserted many late objections to Plaintiffs' discovery requests. *Compare* Doc. 634-3 (Plaintiffs' First Set of Interrogatories to Defendants, dated March 9, 2010) *with* Doc. 634-11 (Defendants' Responses to Plaintiffs' First Set of Interrogatories, dated November 17, 2014 and objecting to every interrogatory). As Plaintiffs have allowed Defendants to assert objections to Plaintiffs' discovery requests in a significantly untimely manner, Plaintiffs should be permitted to assert their marginally late objections.

E. Plaintiffs Are Permitted to Provide Representative Responses to Discovery

Courts in this circuit have recognized and accepted the provision of discovery responses on behalf of all plaintiffs or defendants in a case. *See, e.g.*,

Collins v. NODC, No. 3:13-CV-00255-RCJ, 2014 WL 5149732, at *2 (D. Nev. Oct. 10, 2014) (acknowledging that defendants' supplemental discovery responses were submitted on behalf of all defendants, unlike the initial response which was solely on behalf of one defendant). Moreover, Fed. R. Civ. P. 33(b)(5) provides that while answers must be signed by the party making the answer, objections need only be signed by the attorney who makes the objections. *Id.* ("Signature. The person who makes the answers must sign them, and the attorney who objects must sign any objections."). Here, the named Plaintiffs' responses to all of Defendants' interrogatories were the same objections, therefore one set of responses for all named Plaintiffs was appropriate. It was also appropriate, pursuant to Fed. R. Civ. P. 33(b)(6) for the undersigned counsel, who indisputedly represent all the named Plaintiffs in this case, to sign the objections. Similarly, Plaintiffs' responses to all of Defendants' requests for production were the same in terms of which requests were objected to and which requests would be permitted and documents provided for, therefore one set of responses for all named Plaintiffs was appropriate. As Fed. R. Civ. P. 34 does not require that responses to discovery requests be signed, it was appropriate for the undersigned counsel, who indisputedly represent all the named Plaintiffs in this case, to sign the responses.

F. Defendants Themselves Have Provided Representative Responses to Plaintiffs' Discovery Requests

Defendants should not be heard to argue that Plaintiffs' discovery responses are somehow deficient because they are representative when *all* of Defendants responses to Plaintiffs' discovery requests have been representative as well. *See, e.g.*, Doc. 634-11 (Defendants' Responses to Plaintiffs' First Set of Interrogatories; "Defendants Swift Transportation Co., Inc. and Interstate Equipment Leasing, Inc. ("Defendants") hereby object and respond to the First Set of Special Interrogatories propounded by Plaintiffs Virginia Van Dusen and Joseph Sheer ("Plaintiffs") as

follows:"); Doc. 634-16 (Defendants' Response to Plaintiffs' Fifth Request for Production of Documents; "Defendants Swift Transportation Co. of Arizona, LLC (f.k.a. Swift Transportation Co., Inc.); Interstate Equipment Leasing, LLC (f.k.a. Interstate Equipment Leasing, Inc.); Chad Killebrew; and Jerry Moyes ("Defendants") hereby object and respond to the Fifth Request for Production of Documents, propounded by Plaintiffs Virginia Van Dusen, Jose Motolinia, Joseph Sheer, Vickii Schwalm, and Peter Wood ("Plaintiffs") as follows:"). Indeed, up until the instant motions, all documents filed by Defendants in this case have been filed on behalf of all Defendants. *See, e.g.*, Doc. 592 (Defendants' Answer to Third Amended Collective & Class Action Complaint; "Attorneys for Defendants Swift Transportation Co., Inc. ("Swift"), Interstate Equipment Leasing, Inc. ("IEL"), Chad Killebrew, and Jerry Moyes (collectively, "Defendants") hereby answer Plaintiffs' Third Amended Collective & Class Action Complaint filed on December 5, 2014 (the "TAC") as follows:"). However, as the instant motions filed by Swift and IEL are *exactly the same*, filing separate motions on behalf of each Defendant is a waste of the Court's and the parties' time and resources.

II. DEFENDANTS' DISCOVERY REQUESTS ARE BURDENSOME, OVERBROAD, AND ARE NOT CALCULATED TO LEAD TO DISCOVERABLE INFORMATION

A. Defendants' Interrogatories Are Far Outside the Scope of Permissible Discovery, Which is Limited to the Issue of Whether Plaintiffs Are Exempt Under § 1 of the Federal Arbitration Act

Defendants' Interrogatories are so vastly overbroad and are not relevant to the limited issue of whether Plaintiffs are exempt under § 1 of the Federal Arbitration Act ("FAA") as to be unduly burdensome. For example, Interrogatory No. 1 demands that Plaintiffs identify *all* charges, claims, lawsuits, or legal proceedings in which they were involved at any time in the last ten years.

Defendants do not assert that this is relevant to the § 1 issue; rather they claim that such information is necessary to assist Defendant in testing Plaintiffs' credibility. However, this was not one of the areas of inquiry that Your Honor enumerated in any of the Orders setting forth such areas of inquiry. *See* Docs. 546, 605 and 645. For Plaintiffs to identify every single item Defendants are demanding in this Interrogatory would be disproportionately onerous, particularly given that it is not in any way relevant to the issue of whether Plaintiffs are exempt under § 1 of the FAA.

Similarly, Interrogatory Nos. 2-5, which demand that Plaintiffs provide information regarding other employers they have worked for or applied to work for, at any time during the past ten years, is equally irrelevant. Defendants claim that this information is necessary for them to determine if Plaintiffs worked in prior jobs which provided them with knowledge of the difference between an employee and an independent contractor, so that when they entered into an agreement with Defendant they knew exactly what they were doing. However, this was also not one of the areas of inquiry that Your Honor enumerated in any of the Orders setting forth such areas of inquiry. *See* Docs. 546, 605 and 645. Indeed the topic is entirely irrelevant to whether Plaintiffs were contractors or employees *as a matter of law*. The issue at hand is whether the relationship between Plaintiffs and Defendants was one of employment. Plaintiffs' knowledge about the difference between an employee and an independent contractor has absolutely no bearing on what the relationship between the parties *actually was*. Again, for Plaintiffs to identify every single item Defendants are demanding in these Interrogatories would be excessively burdensome, particularly given that they are not in any way relevant to the issue of whether Plaintiffs are exempt under § 1 of the FAA.

Finally, Interrogatory Nos. 8-11, which demands that Plaintiffs provide information regarding all allegations in the Third Amended Complaint ("TAC"),

are not narrowly tailored to the issue of whether Plaintiffs are exempt under § 1 of the FAA. The TAC raised more than just the issue of whether Plaintiffs were employees or independent contractors. Among other things, the TAC asserts that the contracts Plaintiffs signed with Defendants were unconscionable and that Defendants obtained the continuous labor of Plaintiffs by using threats of serious harm. Clearly these allegations in the TAC are not related to the issue of whether Plaintiffs are exempt under § 1 of the FAA. Thus Defendants' interrogatories demanding that Plaintiffs provide information regarding all allegations in the TAC is not narrowly tailored.

B. Defendants' Requests for Production Demand Documents Unrelated to the Issue of Whether Plaintiffs Are Exempt Under § 1 of the Federal Arbitration Act

Plaintiffs have properly objected to Defendants' Requests for Production ("RFPs") that request documents wholly unrelated to the issue of whether Plaintiffs are exempt under § 1 of the FAA, in much the same way as their Interrogatories do.[4] For example, Swift's RFP Nos. 11, 31, 37-41, and 43-45 and IEL's RFP Nos. 7 and 19 request documents related to "any" allegations in the TAC or allegations in the TAC unrelated to the § 1 issue.

Likewise, Swift's RFP No. 57, which requests documents that describe

[4] Notably, Plaintiffs have provided documents responsive to RFPs that they agree are relevant to the § 1 issue. For example, Plaintiffs have provided documents responsive to Swift's RFP Nos. 1 and 2 (related to Plaintiffs' hours worked for Swift), Nos. 3 and 4 (related to compensation received from Swift), No. 7 (related to complaints Plaintiffs made or questions Plaintiffs asked regarding their classification as an independent contractor while working for Swift) and Nos. 17 and 18 (related to instructions, directions, requirements, directives, rules, or guidance received from Swift); and IEL's RFP No. 1 (related to Plaintiff's lease with IEL), No. 2 (related to Plaintiff's job duties while leasing equipment for IEL) and No. 16 (related to business expenses that Plaintiffs incurred during the time that they leased a truck from IEL).

Plaintiffs' intent as to the type of relationship created (independent contractor or employment) at the time that they signed the contract with Defendant, is unrelated to the § 1 issue. Your Honor recently reaffirmed in *Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-CV-00824 JWS, 2015 WL 1299369 (D. Ariz. Mar. 23, 2015) that:

> the test the court must use to make this determination [of whether an individual is an employee or an independent contractor] is the "economic realities" test, which employs a non-exhaustive list of six-factors set forth by the Ninth Circuit in *Real v. Driscoll Strawberry Associates, Inc.* These 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."
>
> 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.

Id. at *2 (emphasis added). Accordingly, the parties' intent is not relevant to the inquiry before the Court and it was not one of the areas of inquiry that Your Honor enumerated in any of the Orders setting forth such areas of inquiry. *See* Docs. 546, 605 and 645. Again the relevant issue is whether the relationship between Plaintiffs and Defendants was one of employment. The parties' intent regarding the relationship has absolutely no bearing on what the relationship between the parties *actually was*.

IEL's RFP No. 36 demands all documents created, drafted or dictated by Plaintiffs, including documents created at Plaintiff's direction, regarding their relationship with IEL. Plaintiffs appropriately objected to this request, as the term

"regarding [Plaintiff's] relationship with IEL" is so vague and ambiguous that it is meaningless and Plaintiffs cannot determine what documents are responsive to this request.

The discovery demands that Plaintiffs have objected to are unduly burdensome, vastly overbroad and are not narrowly tailored to lead to discoverable information regarding whether Plaintiffs are exempt under § 1 of the FAA. Plaintiffs' objections to those demands are appropriate and Respondents' motion to compel responses to those demands should be denied.

C. Plaintiffs' Discovery Requests Are Narrowly Tailored to the Section 1 Issue

Defendants try to argue that Plaintiffs' discovery requests are just as expansive as Plaintiffs' requests and because Plaintiffs have been granted such discovery, *see* Doc. 645, Defendants should also be granted such discovery. However, unlike Defendants' requests, Plaintiffs' requests are narrowly tailored to determine whether Plaintiffs are exempt under § 1 of the FAA. As Your Honor affirmed again in this case:

> Information about their contracts, leases, contract modifications, insurance, job performance, personnel files, fuel surcharges, and work instructions are examples of relevant information. Information about certain actions Defendants took in relation to Plaintiffs are also relevant; for example, any violation notices issued, disciplinary actions instigated, route changes authorized, invoices and bills sent, data gathered from monitoring efforts, credit reporting or collection efforts taken, and reimbursements issued. Other general information not specifically related to Plaintiffs is also relevant, such as standard form contracts and leases, recruitment information, materials regarding Defendants' rules or policies related to training, discipline, benefits, subcontracting, repair services, safety holds and the like are relevant.

Doc. 645 at p. 4. Plaintiffs' discovery requests seeking "documents and information concerning[ ] ... GPS tracking of drivers," "speed governors whereby Defendant controls the speed Plaintiffs drive" and "documents and information concerning[ ] the instructions [Swift] sends to drivers through the onboard

Qualcomm device" all clearly fall within these topics. As explained above, Defendants' requests do not.

D. Plaintiffs' Objections Are Adequate

Plaintiffs' objections to Defendants' discovery requests were more than sufficient to explain why the discovery requests were objectionable. As explained in Sections II.A. and B. above, Plaintiffs appropriately objected to all discovery requests asking for information regarding any allegation in the TAC because the TAC raised more than just the issue of whether Plaintiffs were employees or independent contractors. Thus, such discovery requests are not narrowly tailored to that issue.

Likewise, Plaintiffs appropriately objected to all discovery requests that demanded information about Plaintiffs' complaints made or questions asked regarding their work because such communications are protected by the National Labor Relations Act ("NLRA"). The foundational purpose of the NLRA is to guarantee that employees are empowered to band together to advance their work-related interests by acting in concert. Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. § 157 (emphasis added). Under Section 8 of the NLRA, it is an unfair labor practice ("ULP") "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157. . . ." 29 U.S.C.A. § 158(a)(1).

Employers are not permitted to interfere with or even interrogate employees concerning their concerted activity. *N.L.R.B. v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 97-98 (2d Cir. 1985); *N.L.R.B. v. Jamaica Towing, Inc.*, 632 F.2d 208,

213 (2d Cir. 1980). Interrogation of employees concerning their communications about concerted activity is not permitted just because a lawsuit otherwise affords discovery opportunities. *Wright Electric, Inc. v. NLRB*, 200 F.3d 1162, 1165 (8th Cir. 2000); *Guess?, Inc., 339 NLRB 432* (2003) (attached as Exhibit E) (unobjected to deposition questioning over attendance at organizing meeting constitutes ULP); *In Re Dilling Mech. Contractors, Inc.*, 357 NLRB No. 56 (Aug. 19, 2011) (attached as Exhibit F) (in a civil action the State court granted a protective order for employees against employer's discovery requests for documents and identity of union members and NLRB found that employer's discovery violated employees Section 7 right to engage in protected concerted activity.). *In Guess? Inc.*, the NLRB wrote:

> we hold that in determining whether the Respondent's deposition questions were lawful, the appropriate analysis is the following three-part test. First, the questioning must be relevant. Second, if the questioning is relevant, it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining this information must outweigh the employees' confidentiality interests under Section 7 of the Act.

Id. at **4. Here, Defendants' RFPs fail each prong of analysis. First, the requested documents are not relevant. Defendants claim that the documents relate to witnesses to Plaintiffs' claims in the TAC. *See* Doc. 646-1 at p. 19. However, the requests do not ask about who witnessed the relevant factors that this Court would need to determine the § 1 exemption, *e.g.*, who witnessed Defendants' control over Plaintiffs. Instead, Defendants request things like, "All DOCUMENTS that show, evidence, memorialize or describe any conversations or COMMUNICATIONS YOU had with anyone regarding YOUR classification as an independent contractor by SWIFT" (Swift's RFP No. 59) and "All DOCUMENTS that show, evidence, memorialize or describe any conversations or COMMUNICATIONS YOU had with anyone regarding YOUR classification as an employee by SWIFT" (Swift's RFP 60). These documents are not relevant because what

Plaintiffs said to others regarding their classification is not determinative of the § 1 exemption. It was not one of the areas of inquiry that Your Honor enumerated in any of the Orders setting forth such areas of inquiry, *see* Docs. 546, 605 and 645, and the topic is entirely irrelevant to whether Plaintiffs were contractors or employees *as a matter of law*. The issue at hand is whether the relationship between Plaintiffs and Defendants was one of employment. Plaintiffs' conversations with others about their classification have absolutely no bearing on what the relationship between the parties *actually was*. Second, given the lack of any relevance, the probing of such communication has no other purpose than to harass the Plaintiffs and put them in the very stressful position of having to reveal their contacts with colleagues, many of whom might have spoken to Plaintiffs in confidence, and the substance of communications. Third, because the requested documents are not relevant, Defendants' interest in obtaining this information does not outweigh Plaintiffs' confidentiality interests under Section 7 of the Act. *See In Re Guess?, Inc.*, at 434. For these reasons, Defendants' motion to compel responses to these RFPs must be denied.

Additionally, the NLRA confers exclusive jurisdiction over ULP charges on the NLRB. "When an activity is arguably subject to [§] 7 or [§] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 245 (1959); *see also Caldwell v. Am. Basketball Ass'n, Inc*., 66 F.3d 523, 527 (2d Cir. 1995) (explaining *Garmon*: "Both the comprehensiveness of the NLRA and the assignment of jurisdiction to a specialized federal agency, the National Labor Relations Board ("NLRB"), led the court to hold that the NLRB has exclusive jurisdiction to adjudicate conduct that arguably violates Section 8."). Thus, to the extent that the Defendants may be

asking the Court to immunize its RFPs on the topic of Plaintiffs' communications with coworkers about concerted activity, only the NLRB may do so, and its rulings are clearly to the contrary.

Finally, even the most cursory glance at Plaintiffs' responses shows that Plaintiffs' objections were stated with more than sufficient detail to explain to Defendants why the requests were objectionable. For example, Plaintiffs' response to Swift's RFP No. 15, which demands all of Plaintiffs' personal tax returns filed over the past twelve years, was:

> **RESPONSE:** In addition to and supplementing the general objections herein, Plaintiffs object that the request is unduly burdensome, and seeks documents neither relevant to this litigation nor reasonably calculated to lead to the discovery of admissible evidence, including that the request is not limited to the applicability of the FAA §1 exemption. Plaintiffs further object that it calls for documents subject to a qualified privilege for tax return information. *See Terwilliger v. York Int'l Corp.*, 176 F.R.D. 214, 217 (W.D. Va. 1997); *Kayner v. City of Seattle*, C04-2567-MAT, 2006 WL 482072 (W.D. Wash. Feb. 27, 2006); *SEC v. Cymaticolor Corp.*, 106 F.R.D. 545 (S.D.N.Y. 1985); *Meranus v. Gangel*, 1991 WL 120484 (S.D.N.Y. 1991); *AAOT Foreign Econ. Assn. Technostroyexport v. International Development and Trade Svcs., Inc.*, 1998 WL 633668 (S.D.N.Y. 1998); *Pac. Coast Steel v. Leany*, 2:09-CV-02190-KJD, 2011 WL 4572008 (D. Nev. Sept. 30, 2011) ("Federal case law recognizes a qualified privilege disfavoring the disclosure of tax returns as a matter of general federal policy."). Plaintiffs further object that it calls for documents outside of the relevant time period for discovery for this litigation.

Clearly Defendants have been sufficiently advised that Plaintiffs are objecting to this request on the basis that there is a qualified privilege for tax return information. Plaintiffs' objections are adequate.

E. Defendants Themselves Have Made Boilerplate Objections to Plaintiffs' Discovery Requests

Defendants should not be heard to complain about the sufficiency of Plaintiffs' objections when Defendants themselves have provided only generic boilerplate objections to virtually every single one of Plaintiffs' discovery requests. For example, Defendants' objection to RFP No. 3 of Plaintiffs' 1st Set of RFPs,

which asked for every employment or owner operator contract including all contract modifications within the last ten years was:

> Defendants object to this Request on the following grounds: It seeks documents that are not relevant to the subject matter involved in the pending action at this time in that it is not relevant to, and not reasonably calculated to lead to the discovery of admissible evidence regarding, the section 1 exemption; it is overbroad, unduly burdensome, oppressive, and harassing; it is not reasonably limited in time or scope; to the extent it seeks documents pertaining to other drivers/owner operators, it seeks to violate third party privacy rights to an extent incommensurate with Plaintiffs' legitimate discovery needs. Defendants further object that this request is unduly burdensome and oppressive to the extent this request seeks electronically stored information which is not reasonably accessible to Defendants.

All of Defendants' objections are a variation on this boilerplate objection. While Defendants' nonspecific objections are not enough for Plaintiffs to ascertain why their requests are improper, Plaintiffs' objections to Defendants' discovery requests provide specific details that sufficiently explain Plaintiffs' position.

III. PLAINTIFFS HAVE PARTICIPATED IN THE DISCOVERY PROCESS IN GOOD FAITH AND SANCTIONS ARE NOT WARRANTED HERE

Contrary to Defendants' assertions, Plaintiffs have participated in the discovery process in good faith. First, Plaintiffs have agreed to numerous and lengthy extensions for Defendants' responses to Plaintiffs' discovery requests rather than immediately declaring that Defendants have waived any objections, *see, e.g.*, Exhibit D, wherein Plaintiffs agreed to a two-week extension on Defendants providing discovery responses, even when such responses were already *several months* late. And in fact Defendants have asserted many late objections to Plaintiffs' discovery requests, asserting that they did not need to respond to many of Plaintiffs' discovery requests because the scope of permissible discovery here is exceedingly narrow and should exclude any evidence regarding the Plaintiffs' working relationship with Defendants, even though Your Honor has repeatedly

found that the Court must look at "the economic realities of the parties' working relationship and not just the contract at issue or the parties' subjective intent." *See* Doc. 645 at pp. 3-4. Defendants refused to supplement their responses and Plaintiffs were forced to move to compel responses to their discovery requests. Your Honor granted Plaintiffs' motion, "reject[ing] Defendants' arguments once again." *See id.* It is Defendants whose actions are sanctionable, not Plaintiffs. *Marquis v. Chrysler Corp.*, 577 F.2d 624, 641 (9th Cir. 1978) ("When a party's conduct during discovery necessitates its opponent's bringing motions which otherwise would have been unnecessary, the court may properly order it to pay the moving party's expenses…").

As explained in Section I.B. above, Plaintiffs' late discovery responses were due to an administrative calendaring error. When Plaintiffs were informed on March 17, 2015, that their responses were past due, they immediately requested an extension from Defendants to provide responses. *See* Exhibit A. Further, Plaintiffs provided responses to Defendants requests *two days* later. *See* Exhibit B. Plaintiffs then received correspondence from Defendants on March 23, 2015, asserting that Plaintiffs' objections had been waived and demanding that Plaintiffs provide supplemental responses to Defendants' discovery requests omitting any objections. Plaintiffs responded to Defendants on March 30, 2015, notifying them that they disagreed that they had waived any objections to Defendants' discovery requests and would not be providing supplemental responses that omitted any objections. *See* Doc. 648-6. Plaintiffs then provided responsive documents three days later on April 2, 2015, or approximately two weeks after being informed that their responses were outstanding.[5] *See* Exhibit C.

On April 2, 2015, Plaintiffs then received correspondence from Defendants

[5] Meanwhile, Plaintiffs are still waiting for the most basic documents in this case months after their demands were sent to Defendants.

again demanding that Plaintiffs supplement their discovery responses. Defendants stated in that correspondence that if Plaintiffs did not provide supplemental responses or respond to Defendants' correspondence by April 10, 2015, Defendants would move to compel, even though the parties had not met and conferred as required by this Court's rules. Plaintiffs did not fail to provide substantive responses for over five months, as Defendants assert. Plaintiffs notified Defendants that they were not supplementing their responses and Defendants stated they would move to compel. It was Defendants who waited three months until June 29, 2015 to contact Plaintiffs to schedule a meet and confer regarding Plaintiffs' responses.

In the phone call between Robert Mussig, Defendants' counsel, and Lesley Tse, Plaintiffs' counsel, to schedule a meet and confer between the parties regarding the discovery requests at issue in this motion and Plaintiffs' 30(b)(6) deposition notices for Swift and IEL, Mr. Mussig stated that Defendants were not interested in going through each of Plaintiff's responses separately, rather Defendants just wanted to know which responses Plaintiffs were willing to revise. Similarly, he stated that Defendants were not interested in going through each topic in the notices separately, but instead insisted that Plaintiffs just withdraw the entire notices and redraft them. Plaintiffs then prudently drafted their motion to compel regarding the 30(b)(6) depositions ahead of the parties' meet and confer in anticipation of Defendants' refusal to discuss each topic individually. Simply because Plaintiffs drafted their motion in advance to file immediately after meet and confer does not mean that they did not meet and confer in good faith. Had Defendants changed their minds and been willing to go through each topic separately and perhaps allowed the parties to agree on some topics and to narrow others, Plaintiffs would have revised their motion prior to filing to reflect this. As Defendants were not willing to do this, Plaintiffs immediately filed their motion as

originally drafted, and as they unfortunately foresaw. Plaintiffs have participated in the discovery process in good faith and no sanctions are warranted here.

CONCLUSION

Plaintiffs, whose negligibly late responses were due to an inadvertent administrative calendaring error, have not waived their objections to Respondents' irrelevant and overbroad discovery responses. As soon as Plaintiffs were made aware of the outstanding discovery responses, they immediately rectified the situation. Respondents have not been prejudiced in anyway because of Plaintiffs' marginally late responses.

Defendants' Interrogatories and Requests for Production ("RFPs") are so vastly overbroad and are not relevant to the limited issue of whether Plaintiffs are exempt under § 1 of the Federal Arbitration Act ("FAA") as to be unduly burdensome. Many of Respondents' Interrogatories and RFPs demand that Plaintiffs provide information and documents regarding all allegations in the Third Amended Complaint, which raised more than just the issue of whether Plaintiffs were employees or independent contractors. Likewise, some of Defendants' requests relate to Plaintiffs' intent as to the type of relationship created (independent contractor or employment) at the time that they signed the contract with Defendant, which Your Honor has held is unrelated to the § 1 issue.

Finally, contrary to Defendants' assertions, Plaintiffs have participated in the discovery process in good faith. Defendants were the ones who declined to go through each of Plaintiff's responses separately during the parties' meet and confer, instead just demanding to know which responses Plaintiffs were willing to revise. For all the reasons set forth herein, Respondents Motion to Compel should be denied in its entirety.

Respectfully submitted this 3rd day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 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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