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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 FOR PROTECTIVE ORDERS**

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INTRODUCTION

Plaintiffs oppose Defendants Swift Transportation Co., Inc. ("Swift") and Interstate Equipment Leasing, Inc. ("IEL") Motions[1] for Protective Order (Docs. 652 and 654). Defendants have unreasonably objected by asserting blanket boilerplate objections to each and every deposition topic, with both 11 separate "General Objections" and numerous other individual objections (Doc. 644-2). Defendants' objections generally amount to a voluminous but unitary boilerplate recitation that the topics are not reasonably calculated to lead to the discovery of admissible evidence regarding whether Plaintiffs are exempt under § 1 of the Federal Arbitration Act ("FAA"), and that the topics are overbroad, unduly burdensome, oppressive, harassing, vague, and ambiguous.[2] In effect, Defendants, by their objections to the deposition notices, are asserting the very same objection they have repeatedly made to discovery beyond the four corners of the written "Contractor Agreement" and Lease. However, this Court has already ruled that discovery is necessary in this case, (Doc. 546, 605), and the Ninth Circuit has also repeatedly held that factors above and beyond the language of the Contractor Agreement are relevant and necessary for this Court to resolve the § 1 exemption issue. Thus, Plaintiffs are merely seeking discovery this Court and the Ninth Circuit have repeatedly found they are entitled to seek.

Furthermore, since Plaintiffs already moved to compel Defendants to sit for the 30(b)(6) depositions (Doc. 644), the subsequent filing of a motion for a protective order

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[1] The instant memorandum is in opposition to both Swift Transportation Co., Inc.'s ("Swift") and Interstate Equipment Leasing, Inc.'s ("IEL") motions for protective order (Docs. 652 and 654). For the reasons set forth in Section I.E. of Plaintiffs' Opposition to Defendants' Motions to Compel Discovery Responses (Doc. 665), a memorandum on behalf of all Plaintiffs in opposition to the motions of all Defendants is both proper and desirable. Indeed, the filing of essentially the *same exact motion* for each Swift and IEL is a waste of this Court's and the parties' time and resources.

[2] At the meet and confer on this dispute, Defendants refused to go through the topics individually, insisting that they be treated as a single group, further evidencing the fact that its objections are to taking depositions in the first place, not to any specific topic.

on exactly the same notices, is at best a trick to obtain the last filing and at worst, an effort to further delay discovery already ordered by the Court. Since this unnecessary motion compounds the work required of the Court and Plaintiffs' counsel, it should be summarily denied and Defendants should be assessed costs and fees for putting everyone to unnecessary work.

This Court set a schedule for discovery (Doc. 548, extended by seven months in Doc. 605, yielding a discovery cut off November 10, 2015) and trial of the Section 1 exemption issue as mandated by the Ninth Circuit thereafter. Docs. 548, 605. Defendants sought a stay of discovery from this Court and from the Ninth Circuit, noting its appeal and mandamus petition. Both this court and the Ninth Circuit rejected Defendants' stay request (Docs. 622 and 637), thereby allowing discovery beyond the four corners of the agreements as set forth in the Orders governing discovery and trial of the FAA Section 1 exemption issue. Yet, by refusing to answer documentary discovery, refusing to designate a 30(b)(6) deponent, objecting to every single notice topic, and now moving for a protective order, Defendants have effectuated the very stay which was denied by this Court and the Ninth Circuit through obstinacy and delay.

As set forth below, and in Plaintiffs' Motion to Compel Defendants to Testify Regarding Topics in Plaintiffs' 30(b)(6) Deposition Notices (Doc. 644), Plaintiffs' 30(b)(6) deposition topics are directly and specifically relevant to whether Plaintiffs are exempt under § 1 of the FAA. The topics all seek to discover, among other things: 1) Swift's right to control Plaintiffs' work; 2) Plaintiffs' opportunity to earn profits from the work performed for Swift; 3) Plaintiffs' investment in equipment and material needed for the work performed for Swift; 4) whether the work performed for Swift requires a specialized skill; and 5) whether the work done by Plaintiffs is an integral part of Swift's business, making them clearly relevant to the topics regularly considered by the Courts in deciding employment/contractor classification cases. Further, there is nothing about the topics that are unduly burdensome. Consequently, Defendants' motions for a protective

order are meritless and should be denied. This court has been required to repeatedly respond to Defendants' baseless discovery opposition. Docs. 546, 605, 622, 645. This motion is nothing but a repetitive motion to delay discovery. Because it is entirely unnecessary and causes unnecessary work and delay, Plaintiffs should be awarded costs and fees on this motion.

BACKGROUND

Plaintiffs served Defendants with 30(b)(6) deposition notices for Defendants Swift and IEL on or about January 9, 2015. Defendants served Plaintiffs with their objections on or about January 30, 2015. On February 6, 2051, Defendants filed an Expedited Motion for an Order Staying Further Proceedings Pending Appellate Review (Doc. 612). Defendants made the motion on the ground that they believe that this Court's January 22, 2015 Order (Doc. 605) conflates the process and trial of the gateway issue of arbitrability with the ultimate determination of the merits of Plaintiffs' claims. The parties continue to argue this issue in the Ninth Circuit Court of Appeals through both the appeals and mandamus procedures; however, both this Court and the Court of Appeals have denied Defendants' motions for a stay of these proceedings pending appellate review on February 17, 2015 and May 15, 2015, respectively (see Docs. 622 and 637). Because of Defendants' stay motions and because of Defendants' unrelenting efforts to appeal this Court's Order setting forth a discovery schedule in this case (Doc. 548), for some time Plaintiffs did not focus their efforts on discovery that was subject to the stay motions and the numerous objections, but rather focused their energies on responding to Defendants' numerous appeal motions and briefs. The result of all this is that Defendants have delayed discovery for over eight months.

Once Defendants' stay motions were denied, Defendants contacted Plaintiffs to schedule a meet and confer. During the June 30, 2015 phone call between Robert Mussig, Defendants' counsel, and Lesley Tse, Plaintiffs' counsel, to schedule the meet and confer, Mr. Mussig stated that Defendants were not interested in going through each topic in

Plaintiffs' deposition notices separately, but instead insisted that Plaintiffs just withdraw the entire notices and redraft them. 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 broadly that they were objecting to Plaintiffs' 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.

ARGUMENT

I. PLAINTIFFS' TOPICS ARE ALL RELEVANT TO THE CASE

Contrary to Defendants' assertions, the topics listed in Plaintiffs' 30(b)(6) deposition notices are all relevant to this case, particularly to whether Plaintiffs are exempt under § 1 of the FAA. 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.*[3] *See also Voggenthaler v. Maryland Square, LLC*,

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[3] 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).

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)).

Broad discovery is necessary here to determine whether Plaintiffs are employees as a matter of law. In its order approving Plaintiffs' comprehensive schedule for the discovery needed to determine what facts bear on Plaintiffs' status as employees or independent contractors, this Court noted that Plaintiffs' comprehensive discovery plan is what is required by the Ninth Circuit's 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 also enumerated additional specific factors that it must examine:

> 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.

(Doc. 546 at 1), *citing Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979).

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

In its order denying Defendants' motion to stay the proceedings and determine the appropriate resolution of the Federal Arbitration Act ("FAA") exemption issue, this Court once again affirmed that comprehensive discovery on factors beyond the language of the Contractor Agreement is necessary to effectuate the remand order:

> The question of whether an agreement is a contract of employment is not simply a question of the stated intent of the parties. If that were the case, then the use of the term "independent contractor" would simply govern the issue. Whether the parties formed an employment contract—that is whether plaintiffs were hired as employees—necessarily involves a factual inquiry apart from the contract itself. That analysis will require the court to consider the "Contractor Agreement as a whole, as well as the lease and evidence of the amount of control exerted over plaintiffs by defendants." Indeed, the distinction between independent contractors and employees is "highly factual." Classifying the arrangement requires the court to consider numerous fact-oriented details, such as 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. Plaintiffs should be provided an opportunity to discover evidence that would affect the court's analysis regarding the parties' intent in this regard.

(Doc. 605 at 5) (citations omitted). Finally, Your Honor most recently found that discovery on class members other than Plaintiffs is appropriate. Doc. 645 at p. 4 ("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.").

Evidence of all of these factors that the Court must consider in order to carry out the instructions of the Ninth Circuit is exactly what Plaintiffs seek in their discovery. Thus not only is the discovery Plaintiffs seek relevant under the broad definition of relevance for discovery purposes, *see Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998) (citing *Hickman v. Taylor*, 329 U.S. 495, 506-07 (1947)) ("Relevance for purposes of discovery is defined very broadly."), it is relevant under even the most narrow interpretation of the term. For example, Plaintiffs seek information concerning the instructions Swift sends to drivers through the onboard Qualcomm device. Qualcomm is the primary way that Swift communicates with its drivers. Clearly what Swift says to its drivers is directly relevant to the level of control they exert over Plaintiffs. Plaintiffs believe, based on our investigation of the claims in this case, that the Qualcomm messages show that Swift told drivers what routes they were required to take, what time to pick up and deliver loads, when to go off duty, etc. This would clearly indicate that Swift exerted a high level of control over Plaintiffs and thus that Plaintiffs were employees. Similarly, documents and information concerning GPS tracking of drivers and speed governors whereby Defendants control the speed Plaintiffs drive are directly indicative of the level of control exerted by Defendants.

Particularly in the trucking context, contractor misclassification requires a wide-ranging inquiry into many factors. For example, Your Honor in *Collinge* found, on plaintiffs' motion for summary judgment, that plaintiff drivers were employees as a matter of law by reviewing an extensive array of factors:

> **a. IntelliQuick exercises significant control over the way in which the drivers perform their jobs**
>
> The first economic realities test factor measures IntelliQuick's right to control the manner in which the drivers perform their work. Because the undisputed evidence shows policies and procedures allow IntelliQuick to

exercise a great deal of control over the manner in which its drivers perform their jobs, this factor strongly favors plaintiffs.

First, IntelliQuick can and does control its drivers' appearance. All drivers are required to wear an IntelliQuick uniform, including a red IntelliQuick shirt and black pants or shorts, accompanied by an IntelliQuick identification ("ID") badge . IntelliQuick also requires its drivers to have their uniforms professionally cleaned.

Second, IntelliQuick trains its drivers on its policies and procedures. IntelliQuick's new driver orientation instructs drivers on which IntelliQuick employees will assign them work, on how to use IntelliQuick's forms—including invoices, delivery slips, and door tags, and on IntelliQuick's deadlines for making deliveries pursuant to each of IntelliQuick's various "Service Types." The orientation informs drivers that they must file their delivery paperwork with IntelliQuick by the next business day, must call IntelliQuick "if anything [they] are doing takes 5 minutes more than expected," and must inform IntelliQuick if an item is undeliverable for any reason, making a notation to that effect on the package's delivery sticker.[25] IntelliQuick instructs its drivers on the physical location where they must scan their packages[26] and the proper way to greet customers.[27] IntelliQuick also mandates the equipment that route drivers must have with them, including a hand truck, ice chest, and clipboard.

*3 At oral argument defense counsel argued that even if IntelliQuick has the hypothetical right to train the drivers, it does not actually train all of them, and the training it does provide does not extend "beyond simple instruction on the operation of communication devices and the physical location of where deliveries would be made." This argument's flawed premise is that only formal training provided at the beginning of a driver's tenure is "training." The record shows that, in addition to initial orientation training, IntelliQuick trains its drivers on an ongoing basis.

Third, IntelliQuick subjects its drivers to a series of "uniform standard operating procedures" ("SOPs"), which regulate what the drivers are required to do, within which "time frame" they must do it, what they are required to wear, and which equipment they must use. IntelliQuick asserts that these SOPs do not show its own control over its drivers because the SOPs are "dictated by specifications set by" its customers. Even assuming this is true, however, IntelliQuick does not dispute that it enforces the SOPs and its own internal policies with "chargebacks" (i.e., financial penalties) that it deducts from the drivers' pay.

IntelliQuick monitors its drivers' work using its "CXT system," which allows IntelliQuick to know where its drivers are at all times and to communicate with them. IntelliQuick also maintains a "care ticket system" that, among other things, documents customer complaints and "service failures," such as late or missed deliveries or protocol violations. When drivers commit service failures, IntelliQuick may sanction them with chargebacks. Care ticket system records show that IntelliQuick closely monitors the details of the drivers' activities and routinely metes out chargebacks or other discipline when a driver's performance falls below expectations. For example, IntelliQuick has disciplined its drivers for:

- not wearing their IntelliQuick uniform or ID badge;

- improperly using IntelliQuick equipment;
- making inappropriate comments;
- improperly filling out or handling paperwork;
- mishandling packages;
- not calling the customer regarding an undeliverable package; and
- not bringing delivery problems to IntelliQuick's attention.

By closely monitoring the drivers' actions and disciplining them for violations of protocol, IntelliQuick exercises extensive control over the manner in which its drivers perform their jobs.

Fourth, IntelliQuick dispatchers have discretion to unilaterally assign pick-ups to Route and Freight Drivers. This supports the inference that these drivers lack the "degree of independence that would set them apart from what one would consider normal employee status." Defendants assert that drivers are free to turn down work, and point to opt-in plaintiff Eddie Miller's ("Miller") and plaintiff Robert Campagna's testimony to that effect. Even if this is true, however, the fact remains that IntelliQuick can and does issue chargebacks to Route and Freight Drivers who turn down assigned work. At oral argument IntelliQuick's counsel implicitly conceded as much by arguing only that IntelliQuick does not assess such chargebacks against On Demand Drivers. This factor weighs in favor of finding that Route and Freight Drivers are employees. Further, because IntelliQuick does not assess chargebacks against On Demand Drivers for refusing work, however, this factor weighs in favor of finding that On Demand Drivers are independent contractors.

*4 Fifth, IntelliQuick controls the time that Freight and Route Drivers must start their work. IntelliQuick gives them a manifest that informs them of their deliveries, which vary from day-to-day, and the time by which the time-sensitive deliveries must be completed. As defendants point out, however, On–Demand Drivers are able to determine when to start their workday. For example, plaintiff Heather Arras testified that the start time for her On–Demand work began when she let dispatch know that she was available. This particular consideration therefore weighs in favor of plaintiffs with regard to Route and Freight Drivers, and in favor of defendants with regard to On–Demand Drivers.

b. The drivers have few opportunities for profit or loss that depend upon their managerial skill

The second economic realities test factor measures "the alleged employee's opportunity for profit or loss depending upon his managerial skill." This factor is relevant because experiencing profit or loss based on one's managerial skill is a characteristic of running an independent business. In *Real*, for example, the Ninth Circuit found that this factor weighed in favor of finding that the strawberry grower plaintiffs were employees because their opportunity for profit or loss appeared "to depend more upon the managerial skills of [their alleged employers] in developing fruitful varieties of strawberries, in analyzing soil and pest conditions, and in marketing than it does upon the [growers'] own judgment and industry in weeding, dusting, pruning and picking."

Assuming all factual inferences in favor of defendants, this factor cuts in favor of plaintiffs. It appears that the drivers' opportunity for profit or loss depends more upon the jobs to which IntelliQuick assigns them than on their own judgment and industry. This weighs in favor of economic dependence.

It is undisputed that the drivers receive "piecework" wages, meaning that they are paid by the job instead of by the hour. Drivers who minimize the costs, or maximize the revenue, of getting from point A to point B may thereby maximize profits. As defendants observe, On–Demand Drivers can maximize profits by declining relatively low-paying jobs and Route and Freight Drivers can minimize costs by ordering their deliveries efficiently. The drivers' ability to increase their profits through such means is limited, however. With respect to revenue, On–Demand Drivers' pay is capped by what IntelliQuick is willing to pay them. With respect to costs, even if Route and Freight Drivers are able to rearrange the order of their deliveries, their ability to realize a profit from this opportunity is constrained by the fact that IntelliQuick decides which deliveries appear on their manifests.

*5 Defendants argue that the drivers can increase their profits in three other ways: by negotiating pay raises, taking on additional work, or selecting fuel-efficient vehicles. None of these arguments is persuasive. As to defendants' first contention, one's ability to obtain a discretionary pay raise is not the type of profit-maximizing "managerial skill" that is characteristic of independent contractor status. Employees and independent contractors alike may request pay raises. The profit-maximizing opportunities that are relevant here are those under the worker's control, not subject to the discretion of the worker's supervisor. Second, a worker's ability to simply work more is irrelevant. More work may lead to more revenue, but not necessarily more profit. Finally, although selecting a fuel-efficient vehicle will likely reduce a driver's costs over the long run, there is little "managerial skill" involved in that decision.

c. The drivers do not make significant investments in equipment or materials, nor do they employ helpers

The third economic realities test factor measures "the alleged employee's investment in equipment or materials required for his task, or his employment of helpers." "The investment 'which must be considered as a factor is the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.' ""In making a finding on this factor, it is appropriate to compare the worker's individual investment to the employer's investment in the overall operation." In *Real*, for example, the Ninth Circuit held that the strawberry growers' "investment in light equipment hoes, shovels and picking carts [was] minimal in comparison with the total investment in land, heavy machinery and supplies necessary for growing the strawberries."

Plaintiffs concede that all drivers must invest in a personal vehicle to make deliveries and some purchase their own scanners. Further, defendants point out that plaintiff Brian Black ("Black") purchased a hand truck and a rubber stamp. These investments are insignificant, however, when compared to the total capital investment necessary to operate IntelliQuick's delivery business, including the cost of acquiring and maintaining warehouse space,

> office space, dispatchers, computers, and the CXT software used to coordinate the deliveries.
>
> Further, although defendants correctly observe that the drivers may hire helpers, this "does not prevent a finding that they are employees." This holds true here in light of defendants' inability to point to any driver who has actually employed a helper. The only evidence defendants cite in this regard comes from Miller's deposition testimony that he "put together a crew" of drivers for a large, two-month job. But even assuming the truth of Miller's testimony and interpreting all reasonable inferences in defendants' favor, the court cannot reasonably infer that Miller employed a helper. Miller did not testify that he employed any drivers himself and, more importantly, when he was specifically asked whether drivers could employ helpers Miller testified that it was possible but he did not know "that anybody ever did it."

Id. at *2-5; *see also, 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) (reversing 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); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1042-46 (9th Cir. 2014) (finding that FedEx delivery drivers are employees under Oregon law) and *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014) (finding that FedEx delivery drivers are employees under California law).

The discovery of similar factors here is just as proper.

II. DEFENDANTS HAVE NOT SHOWN HOW THE TOPICS ARE BURDENSOME

Defendants baselessly argue that the number of topics Plaintiffs have set forth in their notices is burdensome. However, as explained in the previous section, all of the topics listed in the 30(b)(6) deposition notices are relevant to Defendants' relationship with Plaintiffs and Defendants' control over Plaintiffs' work. None of the topics will require preparation of witnesses that is above and beyond the typical 30(b)(6) deposition. Indeed, it is likely that each Defendant will be able to designate, and thus prepare, just one or two witnesses to testify about all of the topics. Moreover, the number of topics in Plaintiffs' notices reflects the level of detail with which Plaintiffs have set forth the areas

they plan to question Defendants, in order to meet their obligation under Fed. R. Civ. P. 30(b)(6) to "describe with reasonable particularity the matters for examination." Had Plaintiffs set forth only broad categories, there would undoubtedly be fewer topics. However, Defendants would no doubt argue that the topics were too broad for them to properly prepare their witnesses. Finally, Plaintiffs have seven hours for the 30(b)(6) deposition (see Doc. 548, following Fed. R. Civ. P. 30), which necessarily limits the number of topics Defendants will likely be questioned on in any case.

"[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)). Defendants have supplied no explanation, citation to authority, or supporting evidence that Plaintiffs' topics are somehow *unduly* burdensome, other than general objections and conclusory recitations. *See Kristensen v. Credit Payment Servs., Inc.*, No. 2:12-CV-0528-APG, 2014 WL 6675748, at *6 (D. Nev. Nov. 25, 2014) ("CPS has not met its burden of establishing that responding to these discovery requests would present an undue burden or expense by its conclusory, unsupported and self-serving statements."); *Wichita Fireman's Relief Ass'n v. Kansas City Life Ins. Co.*, No. 11-1029-CM-KGG, 2011 WL 4908870, at *3 (D. Kan. Oct. 14, 2011) ("virtually all responsibilities in responding to discovery are burdensome. Defendant has not, however, established that the request is unduly burdensome.").

Defendants fail to meet their burden of establishing any burden at all, let alone an undue burden. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 (1981), *citing In re Halkin*, 598 F.2d 176, 193 (1979) ("To establish 'good cause' for a protective order under

[Federal Rule of Civil Procedure] 26(c), '[t]he courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements...'"); *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 whatsoever showing any undue burden that may be caused by having to testify about the listed topics. Accordingly, Defendants should be compelled to produce witnesses to testify about such topics.

III. A 30(B)(6) DEPOSITION OF A CORPORATE ENTITY IS ONE DEPOSITION REGARDLESS OF HOW MANY WITNESSES ARE DESIGNATED REGARDLESS OF HOW MANY WITNESSES ARE DESIGNATED

Defendants absurdly and incorrectly argue that Plaintiffs are attempting to circumvent this Court's limitation of five depositions per side because they would have to designate more than five people as 30(b)(6) witnesses in order to cover the topics identified by Plaintiffs. However, the Advisory Committee Notes to Fed. R. Civ. Pro. 30(a) (2)(A) state that a 30(b)(6) deposition of a corporate entity counts as a single deposition, regardless of the number of witnesses designated to testify: "A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify. Fed. R. Civ. Pro. 30(a) (2)(A) Advisory Committee Notes (1993). *See also, Moyle v. Liberty Mut. Ret. Ben. Plan*, No. 10CV2179-DMS MDD, 2012 WL 5373421, at *4 (S.D. Cal. Oct. 30, 2012), *quoting* Fed. R. Civ. Proc. 30(a) (2)(A) Advisory Committee Notes (1993) ("A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even

though more than one person may be designated to testify."); *Lehman Bros. Holdings, Inc. v. CMG Mortgage, Inc.*, No. CV 10-0402 SC NJV, 2011 WL 203675, at *2 (N.D. Cal. Jan. 21, 2011) (same); *Loops LLC v. Phoenix Trading, Inc.*, No. C08-1064 RSM, 2010 WL 786030, at *1 (W.D. Wash. Mar. 4, 2010) (same); *Lexington Ins. Co. v. Sentry Select Ins. Co.*, No. 1:08CV1539LJO GSA, 2009 WL 4885173, at *9 (E.D. Cal. Dec. 17, 2009) ("[Defendant's] assertions that certain Rule 30(b)(6) depositions should count as more than a single deposition is simply unavailing.").

Moreover, witnesses for a 30(b)(6) deposition do not have to have personal knowledge of the things they are testifying about because they are testifying on behalf of a corporate entity about what the corporation "knows." *Whiting v. Hogan*, No. 12-CV-08039-PHX-GMS, 2013 WL 1047012, at *10 (D. Ariz. Mar. 14, 2013) ("The [30(b)(6)] deponent's testimony binds the corporation and may be used at trial by an adverse party for any purpose."); *Louisiana Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 487 (N.D. Cal. 2012) ("A 30(b)(6) witness testifies as a representative of the entity, his answers bind the entity and he is responsible for providing all the relevant information known or reasonably available to the entity."); *Bd. of Trustees of Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 524, 526 (C.D. Cal. 2008) ("personal knowledge of the designated subject matter by the selected deponent is of no consequence"); *Ericsson, Inc. v. Cont'l Promotion Grp., Inc.*, No. CV O3-00375-PHX-JAT, 2006 WL 1794750, at *4 (D. Ariz. June 27, 2006) ("a 30(b)(6) witness does not need to have personal knowledge because he testifies as to the corporation's position on a matter, not his personal opinion"). The witnesses can be prepared regarding what the corporation "knows," so there is no need for Defendants to designate more than one witness if they so choose. Fed. R. Civ. P. 30(b)(6) ("The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf… The persons designated must testify about information known or reasonably available to the organization."); *Whiting*, 2013 WL

1047012 at *10 ("After receiving the [30(b0(6)] notice, the responding party 'must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the requesting party] and to prepare those persons in order that they can answer fully, completely, unevasively, ... as to the relevant subject matters.'"). Defendants' arguments should be rejected.

IV. PLAINTIFFS HAVE PARTICIPATED IN THE DISCOVERY PROCESS IN GOOD FAITH

Contrary to Defendants' assertions, Plaintiffs have participated in the discovery process in good faith. Because of Defendants' stay motions and because of Defendants' unrelenting efforts to appeal this Court's Order setting forth a discovery schedule in this case (Doc. 548), for some time Plaintiffs did not focus their efforts on discovery that might be stayed but rather focused their energies on responding to Defendants' numerous appeal motions and briefs. Defendants have done nothing but delay this discovery and the effectiveness of that unsavory effort cannot be charged to Plaintiffs.

Once Defendants' stay motions were denied, Defendants contacted Plaintiffs to schedule a meet and confer. During the June 30, 2015 phone call between Robert Mussig, Defendants' counsel, and Lesley Tse, Plaintiffs' counsel, to schedule the meet and confer, Mr. Mussig stated that Defendants were not interested in going through each topic in Plaintiffs' deposition 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. 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 broadly that they were objecting to Plaintiffs' 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*.

Simply because Plaintiffs drafted their motion in advance to file immediately after the parties' 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 completely unwilling 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; Defendants have not.

CONCLUSION

As all of the topics listed in Plaintiffs' 30(b)(6) notices are directly relevant to the issue of whether Plaintiffs are exempt under § 1 of the FAA, and as Defendants have made no showing whatsoever that testifying about these topics is unduly burdensome, Defendants' motions for protective orders should be denied in their entireties. Plaintiffs should be awarded their costs and fees in responding to this baseless, duplicative, unsupported, and entirely unnecessary motion.

Respectfully submitted this 6th day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 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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