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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 DEFENDANTS' OPPOSITION TO PLAINTIFFS MOTION TO COMPEL DEFENDANTS TO TESTIFY REGARDING TOPICS IN PLAINTIFFS' 30(B)(6) DEPOSITION NOTICES**

Table of Contents

Table of Authorities

Cases

Other Authorities

Rules

Treatises

INTRODUCTION

This Court has been required to repeatedly quash Defendants' baseless and unrelenting discovery opposition, which has continually delayed this proceeding. Docs. 546, 605, 622, 645. Both this Court and the Ninth Circuit rejected Defendants' stay motions. Docs. 605 and 637. Yet despite having lost each of these motions, Defendants continue to unreasonably object to Plaintiffs' discovery, asserting blanket boilerplate objections to each and every deposition topic, with both 11 separate "General Objections" and numerous other boilerplate objections asserted to each and every deposition topic (Doc. 644-2). Not one objection is particularized.[1] Defendants' objections to the deposition notices continue a practice of sequential impediment to discovery, opposing the schedule for discovery, opposing discovery beyond the contract, seeking stays, objecting to every single discovery demand in every single way possible, and making the same objections multiple times in the same proceeding. This Court has already ruled that this discovery is necessary in this case and has also repeatedly held that factors above and beyond the language of the Contractor Agreement are relevant and necessary to resolve the § 1 exemption issue. Docs. 546, 605, 622, 645.

This Court set a schedule for discovery (Doc. 548, which had to be extended by seven months in Doc. 605, due to Defendants' discovery obstinacy, yielding a current discovery cut off November 10, 2015).[2] The continued assertion of boilerplate objections

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[1] 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.

[2] 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.

to allowing the 30(b)(6) depositions will likely cause additional delays to discovery and to the trial of the Section 1 exemption issue mandated by the Ninth Circuit. Docs. 548, 605. Defendants have yet to supply documents ordered in this case and yet to sit for depositions contemplated by the initial and subsequent scheduling orders.[3]

Finally, since Plaintiffs already moved to compel Defendants to sit for the 30(b)(6) depositions (Doc. 644), the subsequent filing of two additional motions for a protective order on exactly the same notices (Docs. 652 and 654) seems an effort to further delay discovery already ordered by the Court. Defendants' abusive and relentless delay tactics are sanctionable conduct.

ARGUMENT

I. PLAINTIFFS' HAVE SHOWN WITH SUFFICIENT PARTICULARITY THAT THEIR 30(B)(6) DEPOSITION TOPICS ARE RELEVANT

Plaintiffs have shown with more than adequate particularity (especially given the page constraints for discovery motions) that the topics listed in Plaintiffs' 30(b)(6) deposition notices are all relevant to whether Plaintiffs are exempt under § 1 of the FAA. Local Rule LRCiv 37.1, which deals with Motions to Compel, states simply that when a motion for an order compelling discovery is brought pursuant to Rule 37(a)(3)(B) of the Federal Rules of Civil Procedure, the moving party shall set forth "the reason(s) why said answer, designation or response is deficient." Plaintiffs' Rule 37.1 Statement in Support

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[3] As set forth below, and in Plaintiffs' Motion to Compel Defendants to Testify Regarding Topics in Plaintiffs' 30(b)(6) Deposition Notices (Doc. 644) and Plaintiffs' Opposition to Defendants' Motions for Protective Orders (671), Plaintiffs' have shown with sufficient particularity that their 30(b)(6) deposition topics are directly and specifically relevant to whether Plaintiffs are exempt under § 1 of the FAA. A 30(b)(6) deposition of IEL is appropriate because IEL and its lease are inextricably intertwined with Swift and its contract. Plaintiffs' arguments regarding the deposition of IEL are not untimely, as Defendants incorrectly assert, because Defendants raised the issue in their opposition to Plaintiffs' motion. Plaintiffs are thus entitled to address Defendants' arguments in their reply. Contrary to Defendants' groundless assertions, a 30(b)(6) deposition is a single deposition, regardless of how many witnesses Defendants produce to testify. Finally, Plaintiffs met and conferred in good faith regarding their 30(b)(6) deposition notices. Accordingly, Plaintiffs' motion to compel should be granted.

of Motion to Compel Defendants to Testify Regarding Topics in Plaintiffs' 30(b)(6) Deposition Notices explained in great detail the legal issues at stake and also set forth voluminous case law demonstrating why each topic in the Notices were relevant to the question to be tried. Doc. 644-3 at pp. 2-3. Plaintiffs' Rule 37.1 Statement establishes how Plaintiffs' topics are relevant and "the reason(s) why said answer, designation or response is deficient."

A. The Topics in the Swift 30(b)(6) Notice Relate Directly to the Factors Set Forth in *Real v. Driscoll*

Plaintiffs' deposition topics to Swift are all precisely linked to the factors set forth in *Real v. Driscoll* and trucker misclassification cases. For example, Swift Topic No. 39, which seeks testimony regarding Swift's "business purpose and activities" and Swift Topic No. 40, which seeks testimony regarding Swift's "organizational structure and divisions," go directly to *Real* factor six of "whether the service rendered is an integral part of the alleged employer's business." What Swift testifies its business purpose, activities, and organizational structure to be, will be indicative of whether Plaintiffs' work of hauling freight was an integral part of Swift's business. Swift Topic No. 41, which seeks testimony regarding Swift's "human resources policies and practices" in place from 2008 to 2014 is relevant to all of the *Real* factors, but particularly to *Real* factor one of the degree of Swift's right to control the manner in which Plaintiffs' work was to be performed.

Defendants' argument that Plaintiffs are trying to violate the "apex doctrine" reveals Defendants' lack of understanding of both the apex doctrine and 30(b)(6) depositions. The apex doctrine is designed to limit "potential for abuse or harassment" of discovery "directed at an official at the highest level or 'apex' of corporate management." *Klungvedt v. Unum Grp.*, No. 2:12-CV-00651-JWS, 2013 WL 551473, at *2 (D. Ariz. Feb. 13, 2013). The apex doctrine allows courts to preclude depositions of high level corporate owners who would have no reason to otherwise be considered a witness in a

case. "In considering whether to allow a deposition of an apex executive, the court considers whether the executive has unique, first-hand, non-repetitive knowledge of the facts at issue in the case and whether the party seeking the deposition has exhausted other less intrusive discovery methods." *Id.* The apex doctrine is not an issue here because it only applies to depositions of high level corporate executives, not to depositions of the corporation itself, which is what a 30(b)(6) deposition is. As is explained in more detail in Section II below, any witnesses designated to testify on behalf of Swift or IEL would not be testifying about their own "unique first-hand" knowledge. Rather they would be testifying about what the corporation "knows." And, as Defendants have an obligation to prepare their designees regarding what the corporation "knows," they need not designate any high ranking executives. *See Ingersoll v. Farmland Foods, Inc.*, No. 10-6046-CV-SJ-FJG, 2011 WL 1131129, at *8 (W.D. Mo. Mar. 28, 2011) ("Thus, the 'apex deposition doctrine' does not seem applicable to a 30(b)(6) deposition, where the corporation can name anyone it chooses to respond to the deposition (and, presumably the corporation would name someone with personal knowledge.").

Defendants' argument that deposition topics seeking information on the class of drivers is irrelevant is equally unavailing. Indeed, on Plaintiffs' recent Motion to Compel Discovery Responses (Doc. 631), which Plaintiffs were required to file after Defendants again refused to provide responses to discovery this Court previously held was relevant, Your Honor held that discovery on class members other than Plaintiffs is appropriate for the issue before the Court with respect to Defendants' control of the named-Plaintiffs: "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' 30(b)(6) topics are in accord with the Court's ruling at Doc. 645 and do not seek any information with respect to the topics prohibited by that Order. Moreover, Swift Topic

No. 23 (Number of Swift employee drivers and number of ICOA drivers in each of the years 2008-2014) relates directly to *Real* factors five and six; Swift Topic No. 26: (Number of instances in each of the years 2008 through 2014 where ICOA drivers returned identification, licenses, and base plates to Swift in order to haul for another carrier) relates directly to *Real* factors one, two and five; and Swift Topic No. 48 (Defendants' profits from owner operators and employee drivers) goes directly to *Real* factors two and six.

B. Swift and IEL Are Inextricably Intertwined and the Topics in IEL's 30(b)(6) Notice Relate Directly to the Factors Set Forth in *Real v. Driscoll*[4]

Defendants' argument that a deposition of IEL is inappropriate because IEL could not possibly have information relevant to whether Plaintiffs' ICOAs with Swift fall within the § 1 exemption ignores both the undisputed facts and this Court's numerous holdings regarding what is relevant in this case. The Complaint alleges that Swift and IEL are owned and operated by related individuals for a common business purpose, *i.e.* moving freight interstate for customers of Swift. Third Amended Complaint ("TAC") at ¶ 1. Defendants jointly operate a scheme to treat Swift's employee workforce as independent contractors and to shift Swift's business expenses to its drivers. *Id.* Swift owns IEL and IEL leases the trucks to Drivers who are by simultaneous contracts, required to re-lease the trucks to Swift. The simultaneous contracts and leases are part of an interrelated web of corporate control over the drivers. Defendants do not deny that Swift and IEL are related companies and that their businesses are inextricably

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[4] Plaintiffs' arguments regarding the deposition of IEL are not untimely, as Defendants incorrectly assert, because Defendants raised the issue in their opposition to Plaintiffs' motion. Plaintiffs are thus entitled to address Defendants' arguments in their reply. *See In re Large Scale Biology Corp.*, No. 06-20046-A-11, 2007 WL 2859782, at *1 (Bankr. E.D. Cal. Sept. 25, 2007) ("The purpose of a movant's reply is to respond to an opposition. A reply necessarily raises facts and issues, for the first time, that are germane to the opposition. If the evidence and argument included with a motion were required to anticipate the arguments a respondent might raise in opposition to the motion, the court would not permit the movant to file a reply to any opposition.").

intertwined. *See* Docs. 602 and 603 (Defendants' Rule 7.1 Corporate Disclosures showing that sole member of both renamed Swift entity and renamed IEL entity is Swift Transportation Company). Moreover, Swift does not dispute that Swift's ICOA and IEL's leases are also inseparably entwined with numerous cross-references, and both were required to be signed simultaneously by Plaintiffs as a package. *See* Doc. 81 at ¶¶ 5and 6 (ICOA and lease signed on same day); Doc. 81-2 (ICOA) at pp. 2 and 11 (Schedule A) (referring to the lease of equipment from IEL); Doc. 82-3 (lease) at pp. 1 and 5 (lessees required to authorize Swift to deduct lease payments owed to IEL from their Swift paychecks; termination of lessee's ICOA with Swift is a default of lease with IEL). The point is, the two contracts with two related entities are joined in many respects and it is not possible for the lease operator plaintiffs in this case to have a lease with IEL without having a simultaneous ICOA contract with Swift. Plaintiffs expect to show that the draconian lease termination provisions (e.g. calling for acceleration of all remaining lease payments along with repossession of the truck if a driver is fired by Swift, creates significant practical control over lease drivers. Doc. 82-3 (lease) at ¶13.

Moreover, the Ninth Circuit has recognized that employees may be jointly employed by two employers and that "[t]he test, as always, must focus on the economic realities of the total circumstances." *Real*, 603 F.2d at 756. Because Swift and IEL, and the ICOA and lease, are inextricably intertwined, discovery as to IEL and the lease is directly relevant to whether Plaintiffs were employees of Swift and thus whether the § 1 exemption applies. *See* Doc. 645 at p. 2 ("Federal Rule of Civil Procedure 26(b)(1) provides for liberal discovery…").

IEL Topic No. 14, which seeks testimony on the number of ICOA drivers who leased equipment from IEL in each of the years 2008-2014; the number who leased two vehicles at the same time in each of those years; and the number who leased more than two vehicles at the same time in each of those years, goes directly to *Real* factors one, two and three. IEL Topic No. 15, which seeks testimony on the percentage of, and

number of ICOA drivers who exercised the option to purchase under the lease during each of the years 2008 – 2014 relates directly to *Real* factors two and three. Plaintiffs' deposition topics to both Swift and IEL are directly relevant to the § 1 exemption issue. Accordingly, Plaintiffs' motion to compel should be granted.

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

Defendants incorrectly argue that Plaintiffs are attempting to circumvent this Court's limitation of five depositions per side because they allegedly 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. P. 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. P. 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. P. 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."); *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" and Defendants are thus choosing to multiply designees, not Plaintiffs. *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."); *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.").

III. PLAINTIFFS TOPICS ARE NOT UNDULY BURDENSOME AND DO NOT SEEK PRIVILEGED INFORMATION

Defendants baselessly argue that the number of topics Plaintiffs have set forth in their notices is burdensome. However, as explained in detail in Plaintiffs' Motion to Compel Defendants to Testify Regarding Topics in Plaintiffs' 30(b)(6) Deposition Notices (Doc. 644) and Plaintiffs' Opposition to Defendants' Motions for Protective Orders (671), 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. The analysis of employment misclassification is multifactorial and misclassification in trucking involves analyzing diverse facts, as Your Honor recently reaffirmed in *Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-CV-00824 JWS, 2015 WL 1299369 (D. Ariz. Mar. 23, 2015). To avoid needless repetition, Plaintiffs refer the Court to the briefing in Docs. 644 and 671.

Moreover, Plaintiffs in no way seek privileged information in their deposition topics. Swift Topic No. 17, which seeks testimony regarding the process by which the ICOA was drafted including who and what entities were consulted in the drafting

process, is clearly relevant as it relates to the drafting of the document at the heart of the § 1 exemption issue. Defendants are certainly allowed to claim privileged with respect to the substance of communications with counsel regarding the drafting of the ICOA. However, the identity of counsel who was consulted is not privileged. *See, e.g.*, *Howell v. Jones*, 516 F.2d 53, 58 (5th Cir. 1975) (*citing* 8 Wigmore, Evidence s 2313 (MacNaughton Rev. 1961); McCormick Evidence s 90 (2d ed. 1972); 16 A.L.R.3d 1047 (1967)) ("The great weight of authority, however, refuses to extend the attorney-client privilege to the fact of consultation or employment, including the component facts of the identity of the client and the lawyer."); *Arfa v. Zionist Org. of Am.*, No. CV 13-2942 ABC SS, 2014 WL 815496, at *9 (C.D. Cal. Mar. 3, 2014) (identity of counsel is not privileged). Further, to the extent that there were communications that did not involve counsel or that involved third-parties (so not confidential), the substance of those communications are discoverable. Plaintiffs do not know if there were such communications; that is why they seek discovery on it. If every single communication regarding the drafting of the ICOA was with counsel, Defendants can assert privilege as to their substance. However, to the extent there were communications that are not privileged, Plaintiffs have right to ask about them. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense…"). Similarly, Swift Topics 30 and 42, which seek instances in which Swift has been held liable for payroll taxes or worker compensation for ICOA drivers or otherwise determined by any entity to be an employer of ICOA drivers during years 2008-2014, and past claims, defenses, proceedings or litigation involving Swift, are clearly relevant. These topics seek to discover whether there have been past findings that others in Plaintiffs' position were found to be employees. Again, certainly communications that are not privileged, such as communications that took place in a public forum and/or with third parties – e.g., courts, administrative agencies, are discoverable. Defendants can assert privilege as to the rest.

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. Defendants have not. Defendants have opposed every single deposition topic notwithstanding the wide-ranging factors at issue before the Court. Indeed, this Court has already chastened Defendants for their broad-brush refusal to participate in discovery here:

> Defendants have not specified any particular objection to one of the fifty disputed discovery items listed in Exhibit E. Rather, Defendants' arguments in response to the motion to compel are more general in nature. Thus, the court will not address each of the disputed items and instead the parties should use the court's discussion above as guidance in proceeding with discovery going forward.

Doc. 645 at p. 5. Despite this ruling, Defendants continue to oppose every topic of discovery in multiple motions. No sanctions should issue to Plaintiffs, but rather to Defendants for their conduct, which has already delayed the proceedings in this case and which seems designed solely to delay.

Because of Defendants' stay motions and because of Defendants' unrelenting efforts to mandamus and appeal this Court's unreviewable 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 on responding to Defendants' numerous appeal, mandamus and stay 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' continued refusal to discuss each topic individually as stated. 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 all of 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*.

Defendants failed to proceed in good faith, not Plaintiffs. Simply because Plaintiffs drafted their motion in advance to file shortly after the parties' meet and confer does not mean that they did not meet and confer in good faith – particularly as Defendants objections were boilerplate and they expressly refused to go through the objections one by one. 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

Plaintiffs' 30(b)(6) notices are directly relevant to the issue of whether Plaintiffs are exempt under § 1 of the FAA. Plaintiffs' motion to compel should be granted in its entirety and Defendants' boilerplate objections to every topic should be overruled.

Respectfully submitted this 10th day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 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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