

AMERICAN ARBITRATION ASSOCIATION

GABRIEL CILLUFFO, et al,

Claimants,

v.

CENTRAL REFRIGERATED SERVICE, INC.,
et al,

Respondents.

77 160 00126 13 PLT
(Collective Matter)

**CLAIMANTS' FIRST MOTION FOR SANCTIONS AND THIRD MOTION TO
COMPEL DISCOVERY RESPONSES WITH RESPECT TO DOCUMENT REQUESTS
ONE, TWO, AND THREE**

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ATTORNEYS FOR CLAIMANTS

INTRODUCTION

Nearly a year ago, on March 10, 2014, this Court set a discovery schedule calling for discovery to be completed by 90 days from the end of the opt-in period (the opt-in period ended on August 5, 2014 making the projected end of discovery November 3rd, 2014). Plaintiffs quickly served three requests to produce on April 25, 2014. Ex. 1 (first), May 8, 2014. Ex. 2, (second), and May 23, 2014, Ex. 3 (third). Respondents objected to the requests wholesale, and they objected to every single itemized request within these requests. Extensive email communications and meet and confers were held to deal with the myriad separate objections. During those conferences, Respondents made it clear that they would not answer any of Claimants' discovery demands unless and until Claimants agreed to answer Respondents' later filed demands for each and every opt-in (now approximately 1,340 drivers).

Ultimately, two motions to compel were required by Plaintiffs to get discovery underway.¹ Your Honor first rejected Respondents' refusal to answer any discovery unless Claimants agreed to provide discovery from 30% of the drivers in this case. In that Order, Your Honor asked Respondents to review their prior objections to each and every request and determine which remained. Despite the invitation to review and narrow their objections, Respondents reasserted every single objection to every single request. On the second motion to compel, Your Honor compelled responses to 67 of 76 of the outstanding requests ruled upon (limiting some to just the named Plaintiffs) and you overruled 9 of 76 requests presented. *See* Ex. 4 hereto, listing demands compelled and demands overruled.

Your Honor's decision on this second motion to compel was issued on August 29, 2014. That should have been enough to settle the issue, but it has not proved to be so. By and large, Respondents have simply ignored the Order. Respondents' first two refusals to engage in discovery delayed this case by many months. Respondents' current refusal to comply with the

¹ Respondents initially refused to answer discovery until Claimants agreed to answer their discovery demands for each and every opt-in. That position was later softened to be a demand that 30% of the thousand plus Claimants answer Respondents' discovery. On 7/14/14, Your Honor ruled that Respondents' demand was unreasonable and discovery from a pool of 10-15 Reps chosen by Claimants would be sufficient.

orders compelling discovery have resulted in yet more delay. As a result of the first and second motions to compel, discovery ultimately was extended to February 2, 2015. Order re Scheduling, 9/22/14. And Respondents' recent refusal to supply discovery is the reason Claimants were forced to agree with Respondents' proposed additional extension of discovery by three additional months to May 4, 2015.

At this point, Claimants' First Request to Produce is nearly a year old and despite two motions to compel, exceedingly little of it has ever been answered. Respondents' refusal to participate in discovery has significantly delayed this case.

A. Respondents have continued to subvert discovery.

Since the decisions on the first two motions to compel, Respondents have continued to delay discovery in several critical ways. Critically, Respondents have failed to produce documents they were ordered to produce. They have refused or failed to search for responsive documents by searching for electronic documents and data and failed to perform any keyword searches to find relevant information. Respondents have simply ignored most of the requests. These delays have already necessitated one three month extension to the discovery schedule. It is virtually certain that Respondents' continuing delay will require further extensions to the schedule.

To date, Respondents production to date has been limited to:

- Driver files (with contracts and leases)
- Pay settlements (in CSV form)
- Logs (in CSV form)
- Qualcomm messages (some without attribution)²
- Driver manuals
- Advertisements (with a few scripts/pre-packaged Qualcomm messages)

² At first Respondents only provided Qualcomm messages for drivers during the period they were treated as owner operators. Upon complaint, Respondents supplemented the production to include messages when drivers were treated as employees.

That is the full complement of Respondents' production to date – months after these responses were due.³ This is inadequate for many reasons.

1. Respondents have not provided information they were ordered to provide with respect to drivers other than the Representative Claimants.

Your Honor specifically ordered production for many items with respect to the class as a whole (and not just the Named Plaintiffs or discovery representatives). Respondents were ordered to produce documents pertaining to the class for First Request Items 10, 17, 18-22, 31, 32, 45, 58, and 60 and Third Request, Items 1 and 5-8 (re home leave). Yet Respondents have completely refused to make a production beyond the documents applicable only to the Plaintiffs and Reps.¹⁰

First Request:

Item 10. All documents concerning the policies and blank forms used by respondent(s) to pay Claimants.

No blank forms have been produced. Respondents have an entire staff that calculates pay, yet have produced no documents pertaining to those individuals' work.

Item 17. All documents concerning promises, representations, advertisements, or suggestions made to any or all Claimants regarding expected earnings as an "owner operator."

Respondents have made numerous website representations and promises regarding earnings (recently changed from promising increased profits to the driver, to claiming increased profits to Central), yet Respondents have failed to provide any such text. Furthermore, Respondents have failed to provide any data set relating to the earnings or any document showing that

³ Respondents have produced for all discovery reps, except for Jonathan Brown and Landon Clifford who they claim are outside the limitation period, and Duke Waggoner. Respondents' refusal to provide documents for Brown and Clifford are subject to a separate motion to compel.

¹⁰ The driver manuals provided are clearly applicable to both the Reps and the class, but these are the only documents supplied relevant to the entire group.

Respondents made any calculation relating to the explicit promises regarding how much Drivers make. Yet, clearly Respondents have such data and made such calculations. Furthermore, there must be memos and discussions regarding what statistics are relevant to the representations and how to make such calculations.

Items 18-20 deal with pay data in the aggregate for owner operators and its relation to Respondents' representations as to the amount owner operators earn.

Item 19. All documents concerning average weekly, monthly, and/or annual pay of employee drivers.

Item 20. All documents concerning average weekly, monthly, and/or annual pay of owner operators.

None of this aggregate pay data with respect to owner operators as a class was ever supplied, despite being compelled. These demands and the Order were simply ignored by Respondents.

Item 21. All documents concerning any representations made by any respondent to any Claimant concerning benefits and/or home leave received by Owner Operators.

Home leave representations are critical elements of the questions as to who controls drivers' schedules. Differences between representations and practices are critical to this issue.

Item 22 seeks: All documents concerning a guaranteed home time policy, including but not limited to instructions to driver managers and dispatchers concerning routing drivers home.

Driver Managers are believed to have scripts with respect to how to handle and control drivers.

At least they receive trainings and guidelines. These scripts, trainings, guidelines have never been provided. Since DMs exercise functional control over drivers, including routing them home, the scripts, memos, emails, discussion of practices are critical to determining these issues. No such documents have been provided with respect to any driver, even the Reps, much less all other owner operators.

Item 31 seeks: All documents concerning trainings or instructions given to any person negotiating with drivers to become owner operators on how to conduct such negotiations and/or signings.

Respondents have not provided a single such document.

Item 32 seeks: All documents concerning whether Claimant was free to take any such contract outside of Central's facilities for personal review or review by an attorney.

Again, Respondents have utterly ignored this request and the Order compelling production, providing no documents, no memos, no emails, no policies, no instructions to the individuals who conduct signing meetings with drivers.

Item 45 seeks: Any document concerning any Respondent's limitation on mileage or loads offered to owner operators, including but not limited to (a) Priority given to employee drivers or owner operator for loads and/or mileage; (b) Policies to limit the miles owner operators can drive, (c) Any documents concerning the financial benefits or profits to any Respondent from controlling or limiting the mileage of any owner operator.

Despite being compelled, not a single document concerning Central's priority in the assignment of loads between company drivers and owner operators has ever been provided. Nor has Central supplied discovery about the limits it places on the miles owner operators drive. The contract clearly imposes a mileage penalty for miles in excess of 11,000 per month, however, so Central must actively monitor the miles it allows its owner operator drivers to drive.

Item 58 seeks: All documents concerning any legal opinion, review, investigation, claims, complaints, governmental communication, audit, award, or formal or informal opinion pertaining to the legality or propriety of: (a) any Respondent's treatment of any individuals as independent contractors, (b) any Respondent's non-payment of minimum wages, individually or collectively to any individual or class of worker. (c) The Lease arrangement operated by any Respondent with respect to any owner operator. (d) Any arrangement by which any Respondent obligates any Claimant to pay funds to any individual or entity. (e) Any arrangement by which any Respondent withdraws funds from any Claimant to pay any other individual or entity. (f) Any arrangement by which any Respondent secures a bond, or insurance from any Claimant applicable to any other individual or entity. (g) Any contract change imposed mid-term upon any owner-operator.

Despite being compelled, Respondents never supplied any such documents. Yet, Claimants are aware of at least one governmental finding that Central owner operators are employees as a matter of law. See Ex. 5, U.S. Department of Treasury, SS-8 determination that Central owner

operator was employee, not contractor.

Item 60 seeks: All documents concerning unemployment compensation awarded or declined to any Driver treated or classified by any Respondent as an independent contractor.

Again despite having been compelled, nothing was provided.

As to the Third Request to Produce, Claimants demanded various documents concerning home leaves. See Ex. 4 hereto.

Item 1 seeks: All documents concerning any representation to any employees or “owner operators” as to any respondent’s policies regarding routing drivers for home leave.

Item 5 seeks: All documents concerning any policy of any Respondent concerning routing for home applicable to any employee driver or “owner operator.”

Item 6 seeks: All documents concerning any instructions to Driver Managers concerning routing for home as to any employee driver or “owner operator.”

Item 7 seeks: All documents concerning statistics kept by any Respondent as to routing for home requests, granting or denial of such requests, and/or the statistical or factual basis for any representations made to prospective “owner operators” concerning home leave.

Item 8 seeks: All documents supporting Mr. Hansen’s representation to Arbitrator Irvine that drivers are routinely routed for home every three to four weeks.

For each of these requests, previously compelled, no document has been provided.¹¹

Despite the command to produce responsive documents on all of these requests, Respondents have supplied no memos, no directives, no internal policies, no communications, no emails, no documented practices, no scripts or trainings which Driver Managers are to use to relate to the drivers they manage, etc. Respondents have provided virtually nothing on the critical inquiries in this case. They have clearly undertaken no electronic discovery of their own managers, nor even asked them for responsive documents.

2. Respondents have failed to produce documents relevant to the Discovery Reqs which they were ordered to produce.

¹¹ Central supplied Qualcomm messages for the Reqs and those communications include home leave discussions, but Respondents supplied nothing pertaining to the rest of the class.

Nor have Respondents provided all the documents they were ordered to produce with respect to the Named Plaintiffs and their Representatives. For example, Respondents have not provided responses to the following documents (with unresponded to items in bold):

First Request:

Item 12: All documents concerning **any bonds or accounts** any Respondent required any Claimant to keep, or which any Respondent or Third Party held or kept for any Claimant, including but not limited to the terms, **deposits and withdrawals, the balance, distribution of any such funds.**

Item 13: All documents concerning **the difference between “actual miles” or other miles billed by Central to shipper customers and/or charged to “owner operators” for overage and Household Movers Guide (HHG) miles paid to “owner operators,” including but not limited to a) documents showing the differences between actual and HHG miles, and the amount of money such differences benefits Respondents and disadvantages Claimant and/or other owner operators, and b) documents showing the differences between miles billed by Central to shippers and paid to Claimant on each shipment.**

Item 16: All documents concerning any **Respondent’s charge to or deduction from the pay of any owner operator, for expenses incurred after any Respondent has repossessed any owner operator’s leased truck.**

Item 26: All documents concerning the truck(s) leased by Claimants, including but not limited to: **(a) ownership; (b) registration; c) purchase or lease price paid by CLI or other respondent; (d) purchase or lease price charged by CLI to claimants; e) lease; (f) tax benefit(s) claimed by Central concerning ownership of truck; (g) tax benefit(s) available to claimants; (h) circularity of the lease by which any respondent leases a truck to any claimant for lease to any respondent**

Item 33: All documents concerning any **change(s) to any contract between owner operators and any Respondent, requested, demanded, or imposed by any Respondent during the period covered by the agreement(s), including but not limited to: (a) explanations of any such changes; (b) the reasons for any such changes; (c) analysis of the effect on any party to such changes; (d) deadlines for acceptance of any such changes; (e) instructions to driver managers or others with respect to getting acceptance of such changes from owner operators such as Claimant; (f) consequences to any owner operator should an owner operator refuse to accept any such change to any contract.**

Item 34: All documents concerning fuel surcharges imposed upon any customer of Central for a load borne by any Claimant, including but not limited to: **(a) fuel surcharge funds credited to any Claimant therefrom; (b) fuel surcharge funds kept by any Respondent therefrom.**

Item 35: All documents concerning the miles billed to any customer of Central for a load borne by Claimant.

Item 36: All documents concerning the miles paid to Claimant on such bill.

Item 41: All documents concerning any contract change requested or imposed by any Respondent during the term of any contract with any “owner operator” or group of “owner operators.”

Item 42: All documents concerning whether any owner operator can use any truck leased from CLI to drive for any other trucking company, including but not limited to: (a) requests; (b) approvals; c) denials; (d) instructions to driver managers or any other individuals; (e) policies

Item 44: Any document concerning any Respondent’s offer of loads to each Claimant, including but not limited to, (a) load offers (segregated by Claimant); (b) load acceptances (segregated by Claimant); (c) load refusals (segregated by Claimant)

Item 46: Any other document concerning what any Respondent considers to be evidence of contractor status by any Claimant or other owner operator.

Item 47: All documents concerning the termination of any Claimant’s owner operator status, including but not limited to: (a) declaration of default; (b) acceleration of lease payments; (c) communications with HireRight, DAC or DriverFacts; (d) communications with any trucking company or other prospective employer; (e) communications with credit agencies; (f) communications with debt collectors; (g) communications between the parties; (h) communications with any other individual or entity.

Item 48: All documents concerning how any Respondent will treat the termination of any owner operator’s status, including but not limited to: (a) declaration of default; (b) acceleration of lease payments; (c) communications with HireRight, DAC or DriverFacts; (d) communications with any trucking company or other prospective employer; (e) communications with credit agencies; (f) communications with debt collectors.

Item 49: All documents concerning instructions, claims, demands, bills any Respondent made to Claimant after the lease was terminated.

Item 50: All documents concerning any collections lawsuits commenced by any Respondent against any Claimant or other owner operator.

Item 51: All documents concerning any collections arbitrations commenced by any Respondent against any Claimant or other owner operator.

Item 52: All documents concerning **any collections efforts Respondents made against any Claimant.**

Item 53: **All documents concerning any DAC report entries made by any Respondent concerning Claimant at any time.**

Item 54: All documents concerning any **advance notice given by any Respondent to any owner operator concerning the termination of any lease or contract.**

Item 55: All documents concerning any **Respondent's policy concerning termination of any owner-operator as a contractor with Respondent, including but not limited to: (a) policies; (b) advance notice to any owner operator; (c) communications with any owner-operator concerning termination; (d) collections efforts as to amounts allegedly due from owner operators who have been terminated; (e) communications with any owner operator concerning what amounts any respondent will be considered to be due from any owner operator if any contractor is terminated; (f) communications with any owner operator alleging what steps any Respondent will take if any owner operator were to: (i) cease driving for any respondent; (ii) terminate their lease; (iii) attempt to drive their leased truck for another carrier.**

Item 56: All documents concerning **any Respondent's communications with any police agency claiming that any owner operator's leased truck has been "stolen" or otherwise misappropriated by any such owner operator.**

Item 57: **All documents concerning any owner operator's property when a truck is repossessed, that is: (a) returned by Central; (b) taken by Central.**

Second Request:

Item 1: **All documents concerning the communications leading up to the termination of any driver's owner operator status (whether a claimant herein or not) and repossession of any truck, including but not limited to: (a) Communications between any respondent, and any driver; (b) Ten day advance notice of such termination or repossession; (c) Information serving as the basis for any termination or repossession, including safety related information or claim that any driver violated any law or regulation.**

Item 2: **All documents concerning the location where any owner operator's truck was repossessed in relation to such owner operator's home, including but not limited to whether the distance between such locations was considered or not considered by any respondent in its decision to terminate a driver and repossess any truck.**

Item 3: **All documents concerning any respondent engaging in self-help repossession of any owner operator's leased truck, including but not limited to: (a) The methods**

and means of such repossession; (b) The reason for such repossession, if any; (c) Legal analysis as to when or why CRS or CLI is permitted to engage in self-help repossession; (d) Legal analysis as to whether any respondent is required to engage in arbitration as a means of resolving any dispute with any driver.

Item 4: All documents concerning any **respondent's communications with any police agency, or other individual or entity, to assist with the repossession of any truck leased to an owner operator.**

Item 5: All documents concerning any **Respondent's policy concerning advance notice of termination of any owner-operator as a contractor with Respondent, or repossession of such driver's leased truck, including but not limited to: (a) policies; (b) communications with any owner-operator concerning termination; (c) collections efforts as to amounts allegedly due from owner operators who have been terminated; (d) communications with any owner operator concerning what amounts any Respondent will be considered to be due from any owner operator if any contractor is terminated.**

Item 6: All documents concerning any **Respondent's communications with any police agency claiming that any owner operator's leased truck has been "stolen" or otherwise misappropriated by any such owner operator.**

Item 7: All documents concerning **how any respondent treats any owner operator's property when a truck is repossessed, including but not limited to what is: (a) returned by Central; (b) taken by Central.**

If there are any of these requests as to which there are zero responsive documents, Respondents have never so claimed. And it is completely unfathomable that there simply are no responsive documents to these requests.

3. Respondents have simply failed to search for or produce many common documents which they were ordered to produce.

Because Counsel have spoken with hundreds if not thousands of Central truckers, in fact, we know that there are countless documents that Respondents have simply failed to provide, both with respect to the Plaintiffs, the Reps, and with respect to the class. For example, Respondents have failed to produce:

1. Evidence of other administrative determinations with respect to whether Central employs the drivers it characterizes as owner operators. Ex. 5
2. Evidence of control with respect to mid-term contract changes benefitting the company,

to which Central demands drivers assent under threat that the company will simply place the driver in default (and then repossess the truck, strand the driver far from home, take their escrowed bonds and maintenance funds, make negative DAC entries, and then subject the drivers to dunning and collections lawsuits). See e.g. Ex. 6 and Ex. 7 hereto.

3. Evidence that Respondents do not honor their contracts to arbitrate all disputes, instead engaging in contractually forbidden collections lawsuits in court. See e.g. Ex. 8 hereto.
4. Evidence of Central's informal collections efforts with drivers prior to engaging in formal collections efforts. See e.g. Ex. 9 hereto.
5. Negative DAC report entries if a driver is terminated or turns in their truck early. See e.g. Ex. 10 hereto.
6. Negative credit reports to credit agencies when a driver is terminated.
7. Documents regarding truck repossessions.
8. Documents showing Central stranding drivers far from home during a repossession.
9. Hiring bill collectors to collect debts alleged from drivers who have had their trucks repossessed or who turned in their trucks. See e.g. Ex. 11 hereto.
10. Written policies or protocols regarding co-drivers.
11. Written policies or protocol or correspondence with Owner Operators which require driver trainers to pay for their trainees' schooling if trainee does not complete training period.
12. Owner Operators' profit and loss statements. See e.g. Ex. 12 hereto.
13. Letters to Owner Operators' claiming they are in default of their lease. See e.g. Ex. 13 hereto.

These are a mere fraction of the responsive documents Central has simply pretended it did not possess or as to which it simply ignored its discovery obligations.

4. Respondents have failed to comply with their discovery obligations in other ways.

The failure to produce responsive documents is not the only way that Respondents

impeded discovery. Respondents further impeded discovery by ignoring Claimants' instructions accompanying each demand, by 1) refusing to supply discovery in native or near native format,¹² 2) refusing to categorize documents as responsive to specific requests, 3) refusing to state whether Respondents had finished their production, or were still planning to make further production, and 4) refusing to search for documents electronically that might be responsive to the requests. As the Courts recognize, virtually all relevant documents in this day and age are created and maintained electronically. Respondents failed to engage in a search of known documents, and failed to perform any keyword search to locate relevant documents. Instead, Respondents simply ignored Your Honor's order.

Furthermore, as to the documents which were produced, Respondents have simply produced a response consisting of a single large pdf file, unsegregated by request. It is not even possible to tell where one document begins and another ends. Nor do we know for sure which rep any given document pertains to, if not named in the document. Respondents produced Qualcomm messages, but failed to indicate which Rep the messages pertained to. Claimants requested this information of defense counsel by email on February 4th, and to date, Respondents have ignored this request for clarification.

B. Respondents must be sanctioned for subverting the discovery process.

Plaintiffs hereby move for sanctions. Claimants have already moved to compel twice before. Orders have been entered, but never followed. The parties have held meet and confers on this topic,¹³ and no further progress can be made without the Your Honor's further intervention in the form of sanctions.

¹² Eventually, Respondents agreed to provide the data it keeps about drivers in digital form.

¹³ Plaintiffs had been requesting a meet and confer on these topics beginning on December 11th. Respondents opposed a meeting since Ms. Johnson would be out of the country until January 5th. Claimants insisted on meeting with Mr. Hansen who objected to holding such a meeting. The parties conferred on December 24th and again on January 5th. See Email confirmations, Ex. 14.

Plaintiffs' requests are relevant to determining employment status and the other issues in this case, as this Court already noted. For the broad breadth of issues that must be reviewed to determine employee/contractor misclassification in the trucking industry, please see decisions in the following cases: *Ruiz v. Affinity Logistics*, 667 F.3d 1318 (9th Cir. 2012); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033 (9th Cir. 2014)(drivers were employees, rather than independent contractors, for purposes of claim for illegal deductions from wages); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014)(under California law, package delivery service had right to control manner and means of result desired, and 2 other factors supported employment, rather than independent contractor relationship); *Miranda v. Pacer Cartage*, CASE NO. 37-2014-00008552-CU-JR-CTL (Superior Ct. San Diego Cty. 1/28/15)(Ex. 15 hereto). Each of these decisions reviews wide-ranging facts relevant to the broad considerations implicated in the analysis of employment in trucking.

Your Honor is authorized to sanction Central for violating the discovery orders in this case. AAA Employment Rule 9 states:

9. Discovery

The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.

Your Honor already made such orders and they were proper under the AAA Rules.

Arbitrators also have the broad authority to impose sanctions when a party violates a prior order. AAA's employment rules state that, "The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law." Employment Rule 39(d).

An arbitrator may impose a sanction as deemed appropriate under the circumstances. *Seagate Tech. v. W. Digital Corp.*, 834 N.W.2d 555, 564 (Minn. Ct. App. 2013), *review granted* (Oct. 15, 2013), *aff'd sub nom. Seagate Tech., LLC v. W. Digital Corp.*, 854 N.W.2d 750 (Minn.

2014) (“Accordingly, we reject the argument that the specific authorization of sanctions in other arbitration rules compels the conclusion that the AAA rules for employment disputes do not authorize sanctions.”). Arbitrators and judges regularly impose sanctions when parties violate orders. Those sanctions may include entering a default judgment, dismissing a case, striking a pleading, and prohibiting the defendant from asserting defenses. *See* FRCP 16 ; FRCP 37(b); AAA, 2012 WL 363639 (January 24, 2012) (dismissing case because claimant failed to follow arbitrator’s orders); *Calumet Lumber, Inc. v. Mid-America Indus., Inc.*, 103 F.3d 612 (7th Cir.1997) (holding that entry of default judgment was proper where counsel knowingly skipped a hearing and failed to answer a cross-claim altogether); *Pretzel & Stouffer*, 28 F.3d at 44 (entry of default was proper where party did not file its answer or attend a status hearing); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1213 (8th Cir. 1981) (affirming district court’s decision to strike affirmative defenses and counterclaims because defendant’s “failure to comply was due to a willful, bad-faith effort on the part of [defendant] to delay and obstruct the lawsuit.”); *Sec. & Exch. Comm’n v. Wencke*, 577 F.2d 619, 622 (9th Cir. 1978) (Because Wencke had willfully refused to obey the district court’s discovery order, the court had the authority to strike his answer. Because Wencke was an officer, director, or managing agent of the other defendants, the court also had the authority to strike their answers. Fed.R.Civ.P. 37(b)(2)(C). For the same reasons, the court had authority to enter default judgments against them. Fed.R.Civ.P. 55; 4A J. Moore, Federal Practice, PP 37.03 (2.-5), 37.08.”); *Cabrera v. Am. Diversified Servs. Corp.*, 6:10 Civ. 953-ORL-36, 2012 WL 5188067, *4 (M.D. Fla. Oct. 15, 2012) (FLSA case striking answer and defenses because defendant failed to produce 30(b)(6) witness); *Evans v. Nebraska Beef, Ltd.*, 8:12 Civ. 161, 2014 WL 678844, *2 (D. Neb. Feb. 21, 2014) *aff’d sub nom. Evans v. Nebr Beef*, 582 F. App’x 665 (8th Cir. 2014) (“The record does not show any attempt by the plaintiff to diligently pursue the action to the best of his ability. The court agrees with the magistrate judge that the plaintiff’s failure to provide discovery as required by court order is deliberate and that ‘the appropriate remedy is to strike the non-compliant party’s pleadings and grant the defendant’s motions to dismiss.’ See Filing No. 82, F

& R at 4. The court finds the plaintiff has engaged in a course of intentional delay and contumacious conduct that warrants the drastic sanction of dismissal.”); *Smith v. Sohaan Dev., Inc.*, 6:12 Civ. 1369-ORL-18, 2013 WL 5720163, *4 (M.D. Fla. Oct. 1, 2013) (“Sohaun will be barred on summary judgment and at trial from introduction of any payroll records to contradict Plaintiff’s testimony or the use of similarly-situated employee evidence/testimony to defend against Plaintiff’s claims.”); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1544 (11th Cir. 1993) (affirming entry of default judgment because defendants refused to provide court ordered discoverable information).

And here, federal courts have authority to sanction failure to comply with Court orders. Fed. R. Civ. P. Rule 37 generally provides for the sanction of attorneys’ fees and costs when a party fails to participate in discovery.¹⁴ Sanctions are also routine for the violation of Orders. *See e.g. Lee v. Max Int’l, LLC*, 638 F.3d 1318, 1320-21 (10th Cir. 2011)(“district court’s considerable discretion in this arena easily embraces the right to dismiss or enter default judgment in a case under Rule 37(b) when a litigant has disobeyed two orders compelling production of the same discovery materials in its possession, custody, or control.”). *Tucker Realty, Inc. v. Nunley*, 16 Utah 2d 97, 396 P.2d 410 (1964)(granting judgment against party

¹⁴ Fed. R. Civ. P. 37(5) states:

Payment of Expenses; Protective Orders.

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees. But the court must not order this payment if:

- (i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii)** the opposing party’s nondisclosure, response, or objection was substantially justified;
- or
- (iii)** other circumstances make an award of expenses unjust.

solely for failure to comply with discovery order was a stringent measure, but the trial court did not abuse its discretion under the circumstances.).

Reasonable sanctions in this case include an order to Respondents to comply with prior Orders of this case, including:

1. Immediately provide ALL responsive documents.
2. Conduct searches of ALL reasonable electronic search locations including emails and file server locations.
3. Categorize the existing and future response according the request to which it pertains.
4. Provide documents in native or near-native form (when native production would not be feasible due to proprietary software).
5. Reimburse Claimants' attorneys' fees and costs caused by this delay and the ensuing motion.

CONCLUSION

Defendants should be sanctioned for failing to respond to Plaintiffs' discovery requests as they have been previously ordered by Your Honor to do.

Respectfully submitted this 20 day of February, 2015, by:

/s/ Dan Getman

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