

1 **SUSAN MARTIN (AZ#014226)**
 2 **DANIEL BONNETT (AZ#014127)**
 3 **JENNIFER KROLL (AZ#019859)**
 4 **MARTIN & BONNETT, P.L.L.C.**
 1850 N. Central Avenue, Suite 2010
 Phoenix, Arizona 85004
 Telephone: (602) 240-6900
smartin@martinbonnett.com
dbonnett@martinbonnett.com
jkroll@martinbonnett.com

8 **DAN GETMAN (*Pro Hac Vice*)**
 9 **GETMAN & SWEENEY PLLC**
 9 Paradies Lane
 New Paltz, NY 12561
 (845) 255-9370
dgetman@getmansweeney.com

12 **EDWARD TUDDENHAM (*Pro Hac Vice*)**
 13 228 W. 137th St.
 New York, New York 10030
 (202) 249-9499
etudden@prismnet.com

16 Attorneys for Plaintiffs

17 **IN THE UNITED STATES DISTRICT COURT**
 18 **FOR THE DISTRICT OF ARIZONA**

19 Virginia Van Dusen, et al.,

21 Plaintiffs,

22 vs.

24 Swift Transportation Co., Inc., et al.,

25 Defendants.

) **No. CV 10-899-PHX-JWS**

) **PLAINTIFFS' MOTION FOR**
) **SANCTIONS**

1
2 Pursuant to Fed. R. Civ. P. 37 and LR Civ. P. 37.1, Plaintiffs hereby move for an
3 Order granting their request for sanctions for Defendants' failure to comply with this
4 Court's July 15, 2015 Order (the "Order") granting in part Plaintiffs' motion to compel
5 and directing Defendants to produce documents. Doc. 645. This Motion is supported by
6 the following Memorandum of Points and Authorities, the exhibits hereto including the
7 Declaration of Dan Getman ("Decl.") and the record before this Court.

8 The grounds for this motion are as follows:

9 1. On or about March 31, 2015, Plaintiffs filed their Motion to Compel
10 Discovery Responses from Defendants. Doc. 631. After entertaining Defendants
11 arguments as to why discovery should be refused, this Court issued its Order directing
12 Defendants to produce the documents requested in Exhibit E to Plaintiffs' Motion to
13 Compel except that Defendants did not need to provide documents specifically related to
14 drivers not involved in this litigation. Doc. 645.

15 2. As of the date of this Motion, Defendants have failed to produce myriad
16 documents that this Court ordered them to produce.

17 3. As a result of Defendants failure to abide by this Court's Order, Plaintiffs'
18 ability to have the issues under consideration tried has been severely prejudiced.

19 4. This Court (twice) and the Ninth Circuit rejected Defendants' stay requests,
20 pending its mandamus petition and appeal. Docs. 605, 622, 637.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **BACKGROUND**

23 This litigation began more than five years ago.¹ *See, e.g.*, Doc. 605. Since its
24 inception, the case has been transferred from New York to Arizona, remanded to this
25 Court by the Ninth Circuit to determine whether the FAA applies, and after a barrage of

26 _____
27 ¹ This Court has been briefed on the background facts of this litigation and for this reason
28 they will not be repeated in detail here. *See* Doc. 223, 605.

1 attempts by Defendants to stay proceedings for appellate review, this Court entered an
2 Order calling for a close of discovery in early November 2015 on the issue of whether the
3 parties formed employment contracts which are exempt from arbitration under Section 1
4 of the FAA. *See* Doc. 223, 548, 556, 605, 637; *Van Dusen v. Swift*, 544 Fed. Appx. 724
5 (9th Cir. 2013).

6 Defendants have been on notice of the types of documents Plaintiffs are seeking in
7 discovery since March 9, 2010 when Plaintiffs served their First Request to Produce. This
8 initial discovery was renewed by Plaintiffs on October 3, 2014. In the time since
9 receiving Plaintiffs' Requests for Production, instead of responding by production,
10 Defendants tirelessly refused production and failed to answer almost every single request,
11 repeatedly citing undue burden without any support. *See, e.g.*, Doc. 644, 645
12 ("Defendants have not specified any particular objection to one of the fifty disputed
13 discovery items listed in Exhibit E. To the extent Defendants have some specific
14 objection, they have not clearly identified what item they are disputing, and they have not
15 met their burden of demonstrating with appropriate evidence why that disputed discovery
16 item is irrelevant or overbroad."). Following briefing on the discovery dispute, on July
17 15, 2015, this Court issued its Order granting in part Plaintiffs' motion, directing
18 Defendants to produce the discovery requested in Exhibit E to Plaintiffs' Motion to
19 Compel Discovery in compliance with its order but advising that "Defendants need not
20 provide documents specifically related to drivers not involved in this litigation." Doc.
21 645.

22 Defendants did not produce any documents following the Court's July 15, 2015
23 Order and did not contact counsel for Plaintiffs. On July 28, 2015, counsel for Plaintiffs
24 contacted counsel for Defendants requesting a date by which they could expect to receive
25 a response complying with this Court's Order. Decl. ¶ 3. One week later, on August 4,
26 2015 Defendants' counsel finally responded, stating that they "have been working
27 diligently to ascertain precisely which documents [Defendants] must produce" and that
28

1 they “anticipate producing a number of documents later this week.” Decl. ¶ 4 and Exhibit
2 A. Nearly one month thereafter, Defendants still had not produced a single document
3 complying with this Court’s Order compelling discovery, and Counsel for Plaintiffs again
4 contacted Counsel for Defendants on or about August 31, 2015 advising that Plaintiffs
5 still have not received any compliance with the Court’s order or Plaintiffs’ discovery
6 requests and requesting that Defendants’ counsel call to discuss. Decl. ¶¶ 5-6 and Exhibit
7 B.

8 On Friday, September 4, 2015 at 5:35 pm Eastern Time (over seven weeks after
9 this Court’s Order), Plaintiffs finally received an email from Robert Mussig stating that
10 defense counsel’s paralegal would be sending Plaintiffs the first part of Defendants’
11 supplemental document production shortly and that Defendants intended to produce
12 additional documents no later than the following Tuesday or Wednesday. Decl. ¶ 7 and
13 Exhibit C.

14 On Friday, September 4, 2015 at 6:10 pm Eastern Time, Plaintiffs received an
15 email from defense counsel’s paralegal containing the supplemental document
16 production. Decl. ¶ 8. Defendants’ document production to date consists merely of driver
17 logs for Plaintiffs Motolinia, Schwalm, and Van Dusen; contracts and accompanying
18 documents for Plaintiffs Motolinia, Schwalm, Sheer and Van Dusen; termination notices
19 for the named Plaintiffs; promotional materials/advertisements; new Owner Operator
20 handbooks; driver manuals; and personnel files for Plaintiffs Motolinia and Schwalm.
21 Decl. ¶ 9. It does not contain the vast majority of documents that this Court ordered
22 Defendants to produce, including but not limited to:

- 23 a. Each and every employment or owner operator contract including all
24 contract modifications within the last ten years.
- 25 b. Copies of each and every version of employment or owner operator
26 contract signed by Plaintiff Wood, including all contract modifications,
27 along with all accompanying documents, including but not limited to
28

- 1 insurance, fuel surcharges, fuel rebates, Comdata, maintenance fees,
2 windshield protection, performance bonds, mileage overage.
- 3 c. All documents concerning the purpose of any contract language and the
4 changes of contract terms.
- 5 d. Copies of each and every equipment lease signed by Plaintiff Wood.
- 6 e. All documents concerning any defendant's control of plaintiffs
7 including but not limited to work instructions, starting times, delivery
8 times, routes, rest time, and sequence of plaintiffs' work set by any
9 defendant.
- 10 f. All documents concerning any defendant's instructions to plaintiffs as to
11 when, where, and how plaintiffs work. Decl. ¶ 10.

12 A comprehensive list of the documents this Court ordered Defendants to produce that
13 Defendants have not produced is attached to the Declaration of Dan Getman as Exhibit
14 D.

15 Since September 4, Plaintiffs have not received any additional documents from
16 Defendants' counsel, despite their assertion that they would produce additional
17 documents by September 9. Decl. ¶ 11. Defendants have not even attempted to formulate
18 any justification for their failure to produce the documents that the Court ordered them to
19 produce. Decl. ¶ 13.

20 ARGUMENT

21 **I. Defendants' Failure to Comply With this Court's Order Warrants Sanctions**

22 In deciding a motion for sanctions under Fed. R. Civ. P. 37(b)(2), the Court should
23 consider "(1) the public's interest in expeditious resolution of litigation; (2) the court's
24 need to manage its docket; (3) the risk of prejudice to [the party seeking sanctions]; (4)
25 public policy favoring disposition of cases on their merits; and (5) the availability of less
26 drastic sanctions." *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1022 (9th Cir.
27 2002). While sanctions may be "appropriate when [only] three factors strongly favor
28

1 the[ir] imposition[,]” in this particular dispute all five factors weigh heavily in favor of
2 the imposition of sanctions. *In re Heritage Bond Litigation*, 223 F.R.D. at 530-31
3 (quoting *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002), *cert. denied*, 538 U.S.
4 909 (2003)).

5 Here, the first two factors favor the imposition of sanctions because Defendants
6 failure to produce discovery has forced this litigation to come to a complete standstill,
7 “thereby allowing [Defendants] to control the pace of the docket rather than the Court.”
8 *Yourish v. California Amplifier*, 191 F.3d 983, 990 (agreeing with lower court’s finding
9 that the first two factors favored the moving party when noncompliance “halt[ed] the
10 action” and effectively allowed the non-moving party to “control the pace of the
11 docket”). Defendants’ delay of this proceeding appears to be a *sub rosa* attempt to extract
12 the stay that this Court (twice) and the Ninth Circuit denied Defendants pending their
13 appeal of this Court’s scheduling order, *see* Docs. 605, 622, 637, and is in complete
14 dereliction of Fed. R. Civ. P. Rule 1 (the federal rules “should be . . . employed by the
15 court and the parties to secure the just, speedy, and inexpensive determination of every
16 action and proceeding”) and the Arizona Bar ethical rules.² Defendants have effectively
17 obtained their denied stay, as oral argument of their appeal has now been set for
18 November 16, 2015. Additionally, the third factor favors the imposition of sanctions
19 because Defendants’ failure to produce discovery clearly prejudices Plaintiffs insofar as it
20 prevents them from preparing their case. *See Adriana Int’l Corp. v. Thoeren*, 913 F.2d
21 1406, 1412 (9th Cir. 1990) (“Failure to produce documents as ordered . . . is considered
22 sufficient prejudice.”); *see also In re Heritage Bond Litigation*, 223 F.R.D. at 530. The
23

24 ² *See, e.g.*, Arizona Lawyers’ Creed of Professionalism (“6. I will not engage in excessive
25 and abusive discovery, and I will comply with all reasonable discovery requests;
26 7. I will not utilize delay tactics”); Arizona Rules of Professional Conduct Rule 3.4 (“A
27 lawyer shall not: (a) unlawfully obstruct another party’s access to evidence. . . . (d) in
28 pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent
effort to comply with a legally proper discovery request by an opposing party . . .”); Rule
8.4 (“It is professional misconduct for a lawyer to (d) engage in conduct that is
prejudicial to the administration of justice . . .”).

1 fourth factor favors sanctions because Defendants' failure to produce discovery has
2 "stalled [and] unreasonably delayed" this case effectively preventing this case from
3 "mov[ing] forward toward resolution on the merits." *In re Phenylpropanolamine (PPA)*
4 *Products Liability Litigation*, 460 F.3d 1217, 1228 (9th Cir. 2006); *see also In re Exxon*
5 *Valdez*, 102 F.3d 429, 433 (9th Cir. 1996) (noting a party's absolute refusal to provide
6 discovery interfered resolution of claims on their merits). Finally, the fifth factor favors
7 the imposition of sanctions because, although this Court has yet to impose less drastic
8 monetary sanctions against Defendants, the "efficacy of [such] sanctions is in doubt"
9 because Defendants have willfully failed to produce discovery in violation of this Court's
10 Order even after Plaintiffs' Counsel's attempts to confer. *See In re Heritage Bond*
11 *Litigation*, 223 F.R.D. at 530-31. Moreover, Defendant Swift is the largest trucking
12 company in the country with over \$4 billion in revenue.³ Defendant Swift has shown its
13 willingness to spend exorbitant amounts of money to unreasonably delay this case and to
14 rabidly defend against all of Plaintiffs' attempts to move this case forward to resolution.
15 Thus, monetary sanctions alone would be ineffective against this Defendant. *See*
16 *McDermott v. Palo Verde Sch. Dist.*, No. EDCV 12-01112-VAP, 2013 WL 5525007, at
17 *7 (C.D. Cal. Oct. 4, 2013) ("If Plaintiff's counsel only faced a monetary sanction for
18 failing to comply with the Court's orders, using a pure cost-benefit analysis, a monetary
19 sanction would be ineffective unless it was large enough to offset the gain she would
20 receive" by delaying); *see also In re Eisen*, 31 F.3d 1447, 1455 (9th Cir. 1994) (monetary
21 sanctions do not remedy delay).

22 **A. Evidentiary Sanctions are Appropriate**

23 Defendants' failure to produce discovery in response to this Court's Order merits
24 an award of evidentiary sanctions against Defendants finding that Defendants owner-
25 operators are employees and precluding Defendants from offering any evidence that the

27 ³ Swift Transportation, Section on Company History, [http://www.swiftrtrans.com/who-](http://www.swiftrtrans.com/who-we-are/history)
28 [we-are/history](http://www.swiftrtrans.com/who-we-are/history) (last visited September 22, 2015).

1 owner-operator Drivers are independent contractors and not employees.

2 Determining the appropriateness of a particular sanction is within the sound
3 discretion of the Court. *See, e.g., Raygoza v. City of Fresno*, 297 F.R.D. 603, 606 (E.D.
4 Cal. 2014). “Sanctions may be warranted under [Fed. R. Civ. P. 37(b)(2)] for failure to
5 obey a discovery order as long as the established issue bears a reasonable relationship to
6 the subject of discovery that was frustrated by sanctionable conduct.” *In re Heritage*
7 *Bond Litigation*, 223 F.R.D. 527, 530 (C.D. Cal. 2004) (quoting *Navellier v. Sletten*, 262
8 F.3d 9223, 947 (9th Cir. 2001)). Evidentiary sanctions are appropriate in extreme
9 circumstances where the violation of the court’s discovery order is due to the willfulness,
10 bad faith, or fault of a party, which includes disobedient conduct not shown to be outside
11 the litigant’s control. *In re Heritage Bond Litigation*, 223 F.R.D. at 530 (citations and
12 quotations omitted).

13 Here, the Court noted that Defendants’ argument in their response to Plaintiffs’
14 motion to compel that they do not need to respond to many of Plaintiffs’ discovery
15 requests because the scope of permissible discovery here should exclude any evidence
16 regarding the Plaintiffs’ working relationship with Defendants was no fewer than the
17 third formulation of the same argument Defendants made at docket 542 and at docket
18 566. Doc. 645, at 3. The Court also noted that it rejected that argument at docket 546 and
19 then again at docket 605 after a detailed analysis of other Section 1 cases and applicable
20 case law regarding employment classification. *Id.* Thus, Defendants were already on clear
21 notice regarding what documents are relevant in this case. Despite this, Defendants
22 completely and willfully refused to produce the requested relevant documents, forcing
23 Plaintiffs to move to compel the documents. Then, even after this Court rejected
24 Defendants’ argument “once again” in its Order granting in part Plaintiffs’ motion to
25 compel and directing Defendants to produce the discovery requested in Exhibit E in
26 compliance with its order, *id.*, Defendants failed to fully comply with this Court’s order.
27 Defendants’ actions are the epitome of willfulness, bad faith, and disobedience.

28

1 Evidentiary sanctions as well as monetary sanctions are therefore appropriate.

2 Further, in analyzing the requests on Plaintiffs' motion, the Court concluded that
3 "many of the requests are relevant to whether Plaintiffs were hired as employees or
4 contractors." Doc. 645, at 4. The information sought by Plaintiffs included requests for
5 employment and owner-operator contracts and leases signed by the Plaintiffs,
6 Defendants' policies concerning leased equipment and documents concerning expenses
7 owner-operators were required to pay. *See* Doc. 645, at 4. Evidentiary sanctions are
8 appropriate because Defendants' unjustifiable failure to produce discovery as directed by
9 this Court has made it impossible for Plaintiffs to access to the relevant information that
10 would establish whether the parties formed employment contracts, which are exempt
11 under Section 1 of the FAA. *See Connecticut Gen. Life Ins. Co. v. New Images of Beverly*
12 *Hills*, 482 F.3d 1094, 1097 (9th Cir. 2007) ("The most critical factor to be considered in
13 case-dispositive sanctions is whether "a party's discovery violations make it impossible
14 for a court to be confident that the parties will ever have access to the true facts.")
15 (quotations and citations omitted). *See also Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d
16 1020, 1028 (9th Cir. 2003) (excluding document not produced in discovery: "in the
17 absence of such a justification the district court may validly exclude, as a discovery
18 sanction, evidence not produced in discovery.").

19 **B. Monetary Sanctions are Also Appropriate**

20 Defendants' failure to abide by this Court's Order also warrants the imposition of
21 monetary sanctions. "[Fed. R. Civ. P.] Rule 37(b)(2)(C) allows for an award of monetary
22 sanctions for a party's failure to comply with a discovery order." *Raygoza*, 297 F.R.D. at
23 608. The Rule further states that the Court "must order the disobedient party, the
24 attorney[s] advising that party, or both to pay the reasonable expenses, including
25 attorney's fees, caused by the failure, unless the failure was substantially justified or
26 other circumstances make an award of expenses unjust." Accordingly, Rule 37 imposes a
27 burden on the Defendants to "demonstrate that the[ir] failure was substantially justified or
28

1 that the award of fees would be unjust.” *Raygoza*, 297 F.R.D. at 608; *see also Yeti by*
2 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001);

3 Defendants cannot meet this burden. Not only have Defendants failed to comply
4 with this Court’s Order, they have yet to advance any explanation for their failure, let
5 alone an explanation demonstrating that their failure is “substantially justified.” Even
6 after multiple attempts to contact Counsel for Defendants in an effort to resolve this
7 matter, Defendants have failed to assert any explanation as to why they have failed to
8 provide Plaintiffs with the ordered discovery. *See Marquis v. Chrysler Corp.*, 577 F.2d
9 624, 641-42 (9th Cir. 1978) (affirming award of attorneys’ fees as discovery sanction).

10 Defendants continued failure to abide by this Court’s order prejudices Plaintiffs’
11 ability to proceed and has required Plaintiffs to expend additional resources endeavoring,
12 unsuccessfully, to secure compliance with this Court’s Order. Accordingly, an award of
13 monetary sanctions for Plaintiffs’ Counsel’s time spent conferring with Defendants as
14 well as for the time spent drafting this Motion is appropriate. *See Matrix Motor Co. Inc.*
15 *v. Toyota Motor Sales, USA, Inc.*, No. SACV03604CJCJTLX, 2003 WL 22466218, at *3
16 (C.D. Cal. May 8, 2003) (ordering reimbursement for reasonable expenses and attorney’s
17 fees in connection with bringing a motion for sanctions); *see also Logtale, Ltd. v. IKOR,*
18 *Inc.*, No. C-11-5452 EDL (DMR), 2015 WL 581513 (N.D. Cal. Feb. 11, 2015) (awarding
19 fees for time spent conferring related to motion for sanctions).

20 **CONCLUSION**

21 Due to Defendants failure to produce discovery in accordance with this Court’s
22 Order, Plaintiffs respectfully request sanctions and relief, including:

- 23 (1) An evidentiary finding that Plaintiff owner-operators were employees;
24 (2) Precluding Defendants from litigating the issue of whether Plaintiffs
25 were employees;
26 (3) Awarding Plaintiffs’ their attorneys’ fees and costs on this Motion and
27 on time spent endeavoring to secure Defendants’ compliance;
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- (4) Setting a date certain by which Defendants must comply with this Court's Order;
- (5) Adjudging Defendants in contempt of Court and fining Defendants each day until they comply with all outstanding discovery; and
- (6) Such other and further relief as this Court finds is equitable and just.

Respectfully submitted this 22nd day of September, 2015.

Martin & Bonnett, P.L.L.C.

By: s/Jennifer Kroll
Susan Martin
Daniel Bonnett
Jennifer Kroll

1850 N. Central Avenue, Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900

Dan Getman
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz, NY 12561
Telephone: (845) 255-9370

Edward Tuddenham
228 W. 137th St.
New York, New York 10030

ATTORNEYS FOR PLAINTIFFS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 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:

Ellen M. Bronchetti
Paul S. Cowie
Ronald Holland
Sheppard Mullin Richter & Hampton
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111

s/T. Mahabir