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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(CENTRAL DIVISION)

CHARLES ROBERTS, an individual, and **KENNETH MCKAY**, an individual, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

C.R. ENGLAND, INC., a Utah corporation; **OPPORTUNITY LEASING, INC.**, a Utah corporation; and **HORIZON TRUCK SALES AND LEASING, LLC**, a Utah limited liability company,

Defendants.

C.R. ENGLAND, INC., a Utah corporation; and **OPPORTUNITY LEASING, INC.**, a Utah corporation,

Counter-Complainants,

vs.

CHARLES ROBERTS, an individual, and **KENNETH MCKAY**, an individual,

Counter-Defendants.

PLAINTIFFS' MOTION FOR PROTECTIVE ORDER (CONTENTION INTERROGATORIES) AND BRIEF IN SUPPORT

(ORAL ARGUMENT REQUESTED)

Civil No. 2:12-CV-00302

Judge Robert J. Shelby

Magistrate Judge Brooke C. Wells

BASIS FOR MOTION

PLEASE TAKE NOTICE that Plaintiffs Charles Roberts ("Roberts") and Kenneth McKay ("McKay") (collectively "Plaintiffs"), individually and on behalf of all others similarly situated, by their attorneys Kravit Hovel & Krawczyk, S.C. and the Law Offices of Robert S. Boulter, Esq., move the Court, pursuant to Fed. R. Civ. P. 26(c)(1) and 33(a)(2) and DUCivR 7-1 and 37-1, for an order extending the deadline to respond to the following 22 interrogatories (out of 45 served on February 12, 2013 by defendants C.R. England, Inc. and Opportunity Leasing, Inc.): (i) **Interrogatory Nos. 1-4 and 12-13** from Defendant C.R. England, Inc.'s First Set of Interrogatories to Plaintiff Charles Roberts; (ii) **Interrogatory Nos. 1, 8-10, 13 and 15** from Defendant C.R. England, Inc.'s First Set of Interrogatories to Plaintiff Kenneth McKay; (iii) **Interrogatory Nos. 1-2 and 4-5** from Defendant Opportunity Leasing, Inc.'s First Set of Interrogatories to Plaintiff Charles Roberts; and (iv) **Interrogatory Nos. 4-9** from Defendant Opportunity Leasing Inc.'s First Set of Interrogatories to Plaintiff Kenneth McKay.

PLEASE TAKE FURTHER NOTICE that, pursuant to Fed. R. Civ. P. 29(b), the parties stipulated that Plaintiffs could have until March 22, 2013 to file objections to all 45 of the interrogatories served on February 12, 2013, to substantively answer certain of the remaining 23 interrogatories not subject to this motion, to defer answering until July 31, 2013 certain other of the remaining 23 interrogatories not at issue in this motion, and to file this motion regarding the 22 contention interrogatories identified above. This motion seeks to move the deadline to answer these 22 contention interrogatories to **July 31, 2013** in order to allow Plaintiffs sufficient time to obtain additional discovery before having to provide the factual basis for their contentions and opinions on matters which are mainly within the knowledge and control or C.R. England, Inc. and Opportunity Leasing, Inc. These defendants refuse to grant Plaintiffs until then to answer the 22 contention interrogatories and insist that Plaintiffs answer them by April 3, 2013.

PLEASE TAKE FURTHER NOTICE that, in accordance with DUCivR 7-1(f) and for good cause shown, Plaintiffs request oral argument on the motion at a date and time to be set by the Court. Good cause exists because the matters set forth in this motion bear on the order and process for discovery and because the Court will benefit from being able to question the parties in relation to their arguments on the matter in order to issue a decision.

PLEASE TAKE FURTHER NOTICE that, pursuant to the requirements of DUCivR 37-1(a), Plaintiffs state that reasonable efforts have been made to reach an agreement with C.R. England and Opportunity Leasing, Inc. over the discovery matters set forth in this motion and that the parties have been unsuccessful in reaching a resolution. In particular, Plaintiffs state that the subject of the motion has been the topic of two letters and numerous emails exchanged between March 8, 2013 and March 20, 2013 by counsel as well as a telephonic "meet and confer" conference held between Joseph S. Goode and Robert S. Boulter (for the Plaintiffs) and James S. Jardine (for C.R. England, Inc. and Opportunity Leasing, Inc.) on March 19, 2013 at 2:00 p.m. (MDT).

INTRODUCTION

This is a complex case, with much important discovery still to come. Yet the England Defendants insist that Plaintiffs, right now, answer 22 contention interrogatories, which primarily concern the England Defendants' internal operations and economic data. In essence, they are asking "tell us what you've learned from reviewing our documents."

The overwhelming majority of courts recognize that this use of contention interrogatories is not necessarily improper, but premature, and therefore should be deferred until later in the discovery process, consistent with the discretion afforded district courts by Fed. R. Civ. P. 33(a)(2) that expressly allows them to alter the timing of contention interrogatories to an appropriate phase in the case. Plaintiffs are willing to answer Defendants' questions, but it is simply too early in the case to require answers now.

This motion seeks leave to extend the deadline for answering the 22 interrogatories identified on **Exhibit 1** to July 31, 2013. This will allow Plaintiffs to finish reviewing more than 130,000 pages of documents and complete more than a dozen key depositions scheduled in the coming months.

FACTS

This is a putative class action involving at least 14,708 truck drivers who were fraudulently sold a business opportunity (the "Driving Opportunity") to drive big rig trucks as "independent contractors" for defendant C.R. England, Inc. ("C.R. England") and lease those trucks from C.R. England affiliates (defendants Opportunity Leasing, Inc. ("Opportunity") and/or Horizon Truck Sales and Leasing, LLC ("Horizon")) (collectively, the "England Defendants").[1] (12/19/12 Opportunity Amended Response to Interrogatory No. 1, McKay Interrogatories (Set One), Goode Decl. ¶ 2 and Exh. A; Third Amended Complaint [Dkt. 101], ¶¶ 1-12.)

Plaintiffs Charles Roberts and Kenneth McKay contend that the England Defendants implemented the illegal scheme with two primary goals: (i) shifting most of the costs of hauling C.R. England customers' freight to the so-called "independent contractors," enabling C.R. England to capture all of the customer revenue without paying the expenses necessary to achieve that revenue like most businesses do; and (ii) to establish additional revenue sources by extracting exorbitant payments from lease drivers for such things as the truck lease, insurance, and a variable mileage payment. (*See e.g.*, 3/22/13 Roberts' Response to England Interrogatory

[1] We say "at least" because there is a dispute over the applicable statute of limitations and the appropriate discovery look back period. Plaintiffs insist that the claims date back six years, to May 27, 2005. The England Defendants have asserted a two-year contractual limitation in their agreements. Plaintiffs believe the agreements were induced by fraud and are unenforceable as a result. For purposes of the class certification motion deadline (presently set for May 31, 2013 but subject to a pending motion seeking to adjourn that date to August 23, 2013), the parties compromised and the England Defendants agreed to produce information from January 1, 2008 to the present. The class membership number cited above is for that period. If the Court ultimately decides the issue in Plaintiffs' favor, the class size will be far larger than 14,708 members; if the England Defendants are successful on that issue, it will be somewhat smaller.

Nos. 7, 9, pgs. 7-20, Moss Decl. ¶ 2 and Exh. A.) Plaintiffs and all members of the putative class signed Vehicle Lease Agreements ("VLA's") with Opportunity (or Horizon) and an associated Independent Contractor Operator Agreement ("ICOA") with C.R. England. (TAC ¶¶ 55-56.) The Third Amended Complaint ("TAC") asserts 14 claims for relief (including claims for violations of various business opportunity and consumer fraud statutes as well as state and federal claims under the federal RICO and Utah's "baby RICO" statutes). Plaintiffs seek damages for all Drivers who signed these agreements since May 27, 2005.[2] (TAC, ¶¶ 113-262.)

Since this case was transferred to Utah on March 21, 2012, the parties have been aggressively pursuing discovery. Through March 15, 2013, the England Defendants have produced more than 137,953 pages of documents as well as many video, audio, Excel, database, and PowerPoint files. (Goode Decl. ¶ 3.) Due to the large volume of discovery responses, the England Defendants have needed to produce the documents on a rolling basis. The rolling production should now be complete, according to counsel for the England Defendants. (Goode Decl. ¶ 3.) This production deadline does not relate to documents subject to a motion to compel that Plaintiffs expect to file early in the week of March 25, 2013 ("Proposed Motion to Compel") or other information later learned about in the course of discovery. (Goode Decl. ¶ 3.)

In addition to producing documents, the England Defendants have answered interrogatories (and supplemented those answers), although some of their answers are at issue in the Proposed Motion to Compel. (Goode Decl. ¶ 3.) The parties have conducted eight depositions—four C.R. England employees or representatives and four days (2 days each) of Plaintiffs who are alleged to be Fed. R. Civ. P. 23 class representatives. (Goode Decl. ¶ 3.) They have reserved 20 days between April 8, 2013 and July 19, 2013 (four separate weeks) for Plaintiffs to take key depositions of various current and former employees of the England

[2] Where appropriate, we use defined terms from the August 31, 2012 Third Amended Complaint. The phrase "Drivers" is defined in paragraph 1 of that pleading. (TAC [Dkt. 101], ¶ 1.)

Defendants. (Goode Decl. ¶ 3.) The parties have scheduled 14 depositions during that period; however, Plaintiffs intend to designate other deponents once depositions the week of April 8, 2013 are completed. (Goode Decl. ¶ 3.)

On February 12, 2013, defendants C.R. England and Opportunity served four sets of interrogatories on plaintiffs Roberts and McKay. (Goode Decl. ¶¶ 4-7 and Exhs. B-E.) Not counting multiple subparts derived from the "General Instructions" and "Definitions," which plaintiffs contend are improper and exceed the permissible number under Federal Rule of Civil Procedure 33, C.R. England and Opportunity seek answers to 45 interrogatories. (Goode Decl. ¶¶ 4-7 and Exhs. B-E, pgs. 2-6.) This motion involves 22 pure "contention interrogatories" that ask Plaintiffs to summarize their opinions and contentions under Fed. R. Civ. P. 33(a)(2).[3] (Goode Decl. ¶ 8.) Plaintiffs' initial response deadline was March 18, 2013. (Goode Decl. ¶ 8.)

On March 8, 2013, Plaintiffs alerted C.R. England and Opportunity of their concerns about answering contention interrogatories at this early stage of the case. (3/8/13 Goode Letter, Goode Decl. ¶ 9 and Exh. F.) Initially, Plaintiffs viewed all but three of the interrogatories to be contention interrogatories (as reflected in the March 8, 2013 letter), but the "meet and confer" process resulted in Plaintiffs' narrowing their position to the 22 interrogatories identified in **Exhibit 1**. (Goode Decl. ¶ 9.)

We need to be crystal clear about this: Plaintiffs are not seeking to avoid answering the subject matter of these interrogatories.[4] Instead, consistent with Fed. R. Civ. P. 33(a)(2), they asked C.R. England and Opportunity to stipulate to a July 31, 2013 deadline "until designated

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[3] Attached to this brief as **Exhibit 1** is a list of the 22 interrogatories at issue in this motion. Some of the remaining 23 interrogatories are contention interrogatories as well. The England Defendants have granted Plaintiffs their requested extension on those interrogatories. Certain others have as of this date been answered by the Plaintiffs.

[4] Plaintiffs intend to respond in good faith to the interrogatories but are not waiving any objections regarding burden and the broad scope of the instructions and definitions section of the interrogatories. As noted in *Lawrence v. First Kansas Bank & Trust Co.*, 169 F.R.D. 657 (D. Kan. 1996), the use of contention interrogatories to require the

discovery is complete". (3/8/13 Goode Letter, pg. 2, Goode Decl. ¶ 9 and Exh. F.) In particular, Plaintiffs wish to review all of the documents produced by the England Defendants and complete the above-referenced depositions before they are required to commit themselves under oath on critical issues in the case. (Goode Decl. ¶ 9.) Plaintiffs based this request on the Court's authority under Fed. R. Civ. P. 33(a)(2), which allows it to "order that the [interrogatories] need not be answered ***until designated discovery is complete, or until a pretrial conference or some other time***."[5] (Emphasis added.) (Goode Decl. ¶ 9.) (Emphasis added.)

On March 13, 2013, Attorney James Jardine provided the England Defendants' initial response to the Plaintiffs' March 8, 2013 proposal to extend the deadline for responses to the contention interrogatories:

> Joe:
>
> I was out of the office yesterday afternoon, and I realized after this exchange of emails that I had received your letter last Friday from Denise, but had not either forwarded it to Dave or focused on it, as I was in the midst of some other matters.
>
> As Dave indicated, we will work with you on the deadline for your responses to our interrogatories, and will not hold you to March 18 for your written responses. We will try to get you a written letter responding to your letter either today or tomorrow. ***However, as a preview, we served these interrogatories so as to have responses prior to the depositions of England personnel so that we could understand the bases of allegations made in your complaint***. Our letter will address that issue and the legal basis for our entitlement to those responses prior to your review of the documents and the depositions, especially those based on or referencing specific allegations in the complaint. Given that objective, we would anticipate a written

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opponent to state every fact, identify every witness, and specify each document supporting a contention is objectionable.

[5] Because the response deadline of March 18, 2013 was looming, Plaintiffs' March 8, 2013 "meet and confer" letter requested that C.R. England and Opportunity quickly respond so Plaintiffs would have time to prepare a motion if that proved necessary. (Goode Decl. ¶ 10.) Shortly after leaving voicemails for defense counsel on March 12, 2013, Plaintiffs' counsel received an email from Attorney David Dibble stating that the England Defendants would respond the next day to Plaintiffs' March 8, 2013 letter and that the England Defendants would not hold Plaintiffs to the March 18, 2013 deadline for answering the interrogatories. (3/12/13 Dibble Email, Goode Decl. ¶ 10 and Exh. G.)

> response from you by the end of March. I suggest that after you have reviewed our letter and understand the basis for our position, we can then have a conference call to meet and confer about any differences. I am free on Thursday mid-day for such a call or almost anytime on Friday.
>
> Best wishes,
> Jim

(Goode-Jardine Email Exchange of March 12-13, Goode Decl. ¶ 11 and Exh. H.) (Emphasis added.)

That same day, the parties stipulated that Plaintiffs could have until March 22, 2013 to provide their objections to the four sets of interrogatories, to answer any interrogatories not subject to the parties' dispute, and to move for a protective order if the matter could not be resolved. (Goode Decl. ¶ 12.) They further agreed that, to the extent Plaintiffs ultimately agreed to change course on their request for the extension on the contention interrogatories, Plaintiffs could have until April 3, 2013 to provide substantive answers to them. (Goode Decl. ¶ 12.)

C.R. England and Opportunity formally responded to Plaintiffs' proposal on March 14, 2013. (3/14/13 Jardine Letter, Goode Decl. ¶ 13 and Exh. I.) While acknowledging that the Court has the authority to "modify the time for responding to contention interrogatories[,]" they nevertheless insisted that the interrogatories be answered before the start of depositions the Week of April 8 (i.e., by the agreed-upon deadline of April 3, 2013). (3/14/13 Jardine Letter, pg. 1, Goode Decl. ¶ 13 and Exh. I.) Asserting that not having Plaintiffs' answers to the contention interrogatories "would prejudice [them] in the defense of the upcoming depositions" (3/14/13 Jardine Letter, pg. 1, Goode Decl. ¶ 13 and Exh. I), C.R. England and Opportunity presented essentially four arguments for why Plaintiffs should answer the contention interrogatories before the start of the depositions on April 8, 2013.

- First, they assert that "contention interrogatories early in a case help define and narrow the scope of ongoing discovery." (3/14/13 Jardine Letter, pg. 1, Goode Decl. ¶ 13 and Exh. I.)

- Second, C.R. England and Opportunity point to the fact "that the rules allow for supplementation upon the obtaining of additional facts during discovery[.]" (3/14/13 Jardine Letter, pg. 1, Goode Decl. ¶ 13 and Exh. I.)

- Third, they insist on answers to certain of the contention interrogatories now because "many of [them] seek facts supporting specific allegations in the TAC" and, as a result, C.R. England and Opportunity are "entitled to know the facts plaintiffs had at the time of the pleading, since Rule 11 requires at least some level of factual support for the allegations." (3/14/13 Jardine Letter, pg. 2, Goode Decl. ¶ 13 and Exh. I.)

- Finally, C.R. England and Opportunity assert that certain of the interrogatories "seek to clarify the claims being asserted by plaintiffs in this case." (3/14/13 Jardine Letter, pg. 2, Goode Decl. ¶ 13 and Exh. I.)

After reviewing the March 14, 2013 letter and considering the legal and factual issues, on March 18, 2013 Plaintiffs sent an email to counsel for C.R. England and Opportunity offering this compromise in advance of the scheduled "meet and confer:"

> Jim and Dave
>
> In advance of our call tomorrow at 2 p.m. (MDT), I wish to update you on our position so we can be efficient in our call.
>
> Having reviewed your letter of March 14, 2013 and after reviewing the interrogatories again over the weekend, we will expand the list of those interrogatories we will substantively answer by this Friday to the following interrogatories:
>
> **England to Roberts**
>
> Nos. 5-7, 9 and 14
>
> **England to McKay**
>
> Nos. 2-7 and 11-12
>
> **Opportunity to Roberts**
>
> No. 3

> **Opportunity to McKay**
>
> Nos. 2-3
>
> This constitutes a change in our position from that laid out in my letter of March 8, 2013 as it expands the list of those we will answer. We agree to do so without prejudice to supplement the responses at a later time and reserving all objections. With respect to those not on this list, it remains our position to file a motion for protective order on Friday if we cannot work it out [sic] our call tomorrow.
>
> Thanks for your consideration.
>
> Joe

(3/18/13 Goode Email, Goode Decl. ¶ 14 and Exh. J.)

On March 19, 2013, counsel discussed their respective positions and agreed that Mr. Jardine would respond to the good faith offer made by Plaintiffs the day before in attempting to bridge the gap. (Goode Decl. ¶ 15.) Later that day, Mr. Jardine sent an email, stating that they would agree to suspend their demands for a response to the following seven interrogatories until July 31, 2013: (i) Interrogatory Nos. 8 and 10-11 (England to Roberts); (ii) Interrogatory No. 14 (England to McKay); (iii) Interrogatory Nos. 6-7 (Opportunity to Roberts); and (iv) Interrogatory No. 1 (Opportunity to McKay).[6] (3/19/13 Jardine Email, Goode Decl. ¶ 15 and Exh. K.) In a series of email exchanges on March 19-20, 2013, counsel agreed they could not in good faith reach an agreement about the deadline for answering 22 of the 45 interrogatories. (Goode Decl. ¶ 15 and Exh. K.)

Plaintiffs then served objections and responses to all four sets of interrogatories, substantively answering 17 of 45 on March 22, 2013, deferring (by agreement with the England

[6] In the telephonic "meet and confer" held on March 19, 2013, the parties also discussed Interrogatory No. 10 in the C.R. England set propounded on Roberts. (Goode Decl. ¶ 15.) While the England Defendants ultimately agreed to allow Plaintiffs to defer an answer, Plaintiffs have answered that interrogatory as it is somewhat interrelated to Interrogatory No. 9 on the issue of insurance which Plaintiffs had already agreed to answer. (Goode Decl. ¶ 15.) For that reason, there are six interrogatories whose answers are deferred until July 31, 2013 by agreement.

Defendants) answers to six others, and leaving the deadline for answering the remaining 22 interrogatories for resolution by this motion. (3/22/13 Roberts' Response to England Interrogatories, Moss Decl. ¶ 2 and Exh. A; 3/22/13 Roberts' Response to Opportunity Interrogatories, Moss Decl. ¶ 3 and Exh. B; 3/22/13 McKay's Response to England Interrogatories, Moss Decl. ¶ 4 and Exh. C; 3/22/13 McKay's' Response to Opportunity Interrogatories, Moss Decl. ¶ 5 and Exh. D.) Then, Plaintiffs filed this motion seeking a protective order enlarging the deadline to answer to July 31, 2013 for the following 22 interrogatories: (i) England to Roberts (Nos. 1-4, 12-13); (ii) Opportunity to Roberts (Nos. 1-2, 4-5); (iii) England to McKay (Nos. 1, 8-10, 13, 15); and (iv) Opportunity to McKay (Nos., 4-9). The text of these 22 interrogatories is set forth on **Exhibit 1** to this brief.

ARGUMENT

I. CONTENTION INTERROGATORIES SHOULD RARELY BE USED BEFORE DISCOVERY IS ALMOST COMPLETE.

As in many cases involving contention interrogatories, the issue here is not whether they will be answered, but when. *E.g., HTC Corp. v. Technology Prop., Ltd.*, 2011 WL 97787 at *1 (N.D. Cal. Jan. 12, 2011); *Ziemack v. Centel Corp.*, 1995 WL 729295 at *2 (N.D. Ill. Dec. 7, 1995). Plaintiffs agree that they will answer the 22 contention interrogatories in dispute, but contend that they should not be required to do so ***now***, when tens of thousands of pages of the England Defendants' documents remain to be reviewed and more than a dozen of their key witnesses have not been deposed.[7]

Plaintiffs' position is rooted in the words of Rule 33(a)(2), which authorizes contention interrogatories and directs that "the court may order that [such] interrogator[ies] need not be

[7] By agreeing that they will provide substantive responses by July 31, 2013, Plaintiffs are not waiving objections to the form and scope of the contention interrogatories at issue. Instead, Plaintiffs' responses will fairly meet the substance of the interrogatories, while reserving their objections. To review how Plaintiffs have handled the issue thus far, we refer the Court to Exhibits A through D of the Declaration of Brennan H. Moss, which are Plaintiffs' March 22, 2013 interrogatory responses served on C.R. England and Opportunity.

answered until designated discovery is complete, or until a pretrial conference, or some other time." "Due to the nature of contention interrogatories, they are more appropriately used after a substantial amount of discovery has been conducted – typically, at the end of the discovery period." *Capacchione v. Charlotte-Mecklenburg Schools*, 182 F.R.D. 486, 489 (W.D.N.C. 1998). Literally dozens of district courts across the country have adopted this presumption favoring deferral of responses to contention interrogatories until substantial discovery is complete.[8]

Courts identify several sound policy reasons for deferring the use of contention interrogatories to the later phases of a case. First, "[c]ompelling parties to respond partially to [contention] interrogatories early in the litigation when they will likely simply be asked to respond again, upon completion of document review or other phases of discovery, lacks finality and compounds the time, effort, and cost of the litigation." *In re Checking Account Overdraft Litig.*, 2010 WL 5136043 at *3 (S.D. Fla. Dec. 16, 2010); *see also In re eBay Seller Antitrust Litig.*, 2008 WL 5212170 at *2 (N.D. Cal. Dec. 11, 2008) ("[T]he tentative nature of any responses generated at this stage would be of questionable value to the goal of efficiently advancing the litigation").

Second, parties that must answer contention interrogatories when significant discovery remains to be taken "may have to articulate theories of their case not yet fully developed." *B. Braun Med. Inc. v. Abbott Labs.*, 155 F.R.D. 525, 527 (E.D. Pa. 1994). Under such circumstances, deferring responses "protects the responding party from being hemmed into

[8] In addition to the cases cited in the body of this brief, the following nine decisions adopt a general rule favoring the deferral of answers to contention interrogatories until later in the discovery period, unless the proponent demonstrates good reason to require early answers: *EEOC v. Sterling Jewelers, Inc.*, 2012 WL 1680811 at *8 (W.D.N.Y. May 14, 2012); *Gregg v. Local 305 IBEW*, 2009 WL 1325103 at *7 (N.D. Ind. May 13, 2009); *In re H&R Block Mortg. Corp., Prescreening Litig.*, 2007 WL 325351 at *6-*7 (N.D. Ind. Jan. 30, 2007); *City and Cnty. of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 222 (N.D. Cal. 2003); *Conopco, Inc. v. Warner-Lambert Co.*, 2000 WL 342872 at *4-*5 (D.N.J. Jan. 26, 2000); *McCarthy v. Paine Webber Group, Inc.*, 168 F.R.D. 448, 450-51 (D. Conn. 1996); *Everett v. USAir Group, Inc.*, 165 F.R.D. 1, 3-4 (D.D.C. 1995); *Nestle Foods Corp. v.*

fixing [its] position without adequate information." *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 233 (E.D.N.Y. 2007). *See also Vosen v. Warren*, 2004 WL 1946396 at *2 (W.D. Wis. Aug. 31, 2004) ("[I]t is too early in the case to lock parties tightly into theories that might change a bit with the discovery of additional facts").

Third, courts view contention interrogatories skeptically when they seek factual detail about matters that are mostly or exclusively known to the proponent of the interrogatories. "[A]t least in cases where defendants presumably have access to most of the evidence about their own behavior, it is not at all clear that forcing plaintiffs to answer these kinds of questions, early in the pretrial period, is sufficiently likely to be productive to justify the burden that responding can entail." *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 337-38 (N.D. Cal. 1985). Courts often view early contention discovery as "wasteful where . . . many of the interrogatories are directed to the proponents' own statements and conduct." *Checking Account Overdraft Litig.*, 2010 WL 5136043 at *3. *See also Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992) (court demands "special vigilance" in evaluating need for contention interrogatories where "defendants appear to have control over or adequate access to much of the evidence of their alleged misconduct").

Based on these reasons to doubt the usefulness and efficiency of contention interrogatories before substantial discovery has been done, numerous district courts have adopted an analytical framework that shifts the ordinary burdens of a discovery dispute:

> Typically, the burden is on [the] party resisting discovery to justify protection from providing the discovery sought in the time frame provided by the rules. However, the burden is different for contention interrogatories. "The party serving contention interrogatories bears the burden of proving how an earlier response assists the goals of discovery."

Aetna Cas. & Sur. Co., 135 F.R.D. 101, 110-11 (D.N.J. 1990); *Roth v. Bank of the Commonwealth*, 1988 WL 43963 at *4-*5 (W.D.N.Y. May 4, 1988).

Vishay Dale Elecs., 2008 WL 4868772 at *5, (D. Neb. Nov. 6, 2008) *quoting B. Braun Med.*, 155 F.R.D. at 527.

Many of the courts applying this burden-shifting methodology adopt the analysis set forth in *Convergent Technologies*, where the court ruled that initially, "a party who wants *early* answers to contention interrogatories must hand-craft a limited set of questions." 108 F.R.D. at 338 (emphasis in original). In addition, the proponent is required to make an affirmative showing that answers would help achieve one (or more) of four goals central to the Federal Rules of Civil Procedure: "contribute meaningfully to clarifying the issues in the case, narrowing the scope of the dispute, or setting up early settlement discussions, or that such answers are likely to expose a substantial basis for a motion under Rule 11 or Rule 56." *Id*. at 338-39. Finally, the proponent of early contention interrogatories

> cannot meet its burden of justification by vague or speculative statements about what might happen if the interrogatories were answered. Rather, the propounding party must present ***specific, plausible grounds*** for believing that securing early answers to its contention questions will materially advance the goals of the Federal Rules of Civil Procedure.

108 F.R.D. at 339 (emphasis added).

Finally, we note that some decisions that adhere to the majority position and view contention interrogatories with a skeptical eye nevertheless order immediate answers, often because significant discovery had already been taken and the reasons that warrant deferral early in a case no longer existed. *E.g., Louisiana Pacific Corp. v. Money Market 1 Inst. Inv. Dealer*, 285 F.R.D. 481, 492 (N.D. Cal. 2012) (ordering responses to contention interrogatories when fact discovery was about one week from closing); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2012 WL 4111728 at *4 (N.D. Cal. Sept. 17, 2012) (requiring answers to contention interrogatories where the case had been pending nearly three years, class certification was pending, and fact discovery was set to close in two months); *Ziemack.*, 1995 WL 729295 at

*2 (case had been pending 3½ years and a significant amount of discovery had taken place; court orders immediate answers to some contention interrogatories and defers answers to others). These cases demonstrate that we are not urging this Court to adopt an inflexible rule, but to follow a well-trodden path of fundamental principles that guide a court in exercising the discretion expressly vested in it by Fed. R. Civ. P. 33(a)(2).

II. THE ENGLAND DEFENDANTS CANNOT MEET THEIR BURDEN OF JUSTIFYING EARLY RESPONSES TO THEIR CONTENTION INTERROGATORIES.

By asking contention interrogatories that seek to elicit information about their own conduct and the internal economics of their own businesses, the England Defendants essentially demand, "tell us what you've found in our documents so far." We think it impossible to read the following interrogatories any other way:

> **England to Roberts:**
>
> **INTERROGATORY NO. 1**
>
> Please identify all information supporting your contention in paragraph 247 of the Complaint that "Defendants enroll far more driving school students than they could ever employ . . . and they switch almost all students to purchasing the Driving Opportunity."
>
> **INTERROGATORY NO. 2**
>
> Please identify all information supporting your contentions in paragraph 40 of the Complaint, including, but not limited to, your contentions that "21% of independent contractors do not earn more than $50,000," that "the testimonials were false and fabricated," and that "independent contractors do not average 33% more miles than company drivers."
>
> **Opportunity to Roberts:**
>
> **INTERROGATORY NO. 1**
>
> Please identify all information supporting your contentions in in paragraph 62 of the Complaint that "ENGLAND and HORIZON knew but concealed that"

(1) "the vast majority of Drivers purchasing the Driving Opportunity failed within a year or two," including, but not limited to, the definition of "failed" used by you in responding to this interrogatory;

(2) "the vast majority of Drivers purchasing the Driving Opportunity did not make as much money as company drivers"; and

(3) "no significant portion of those that had purchased the Driver Opportunity had made a 'career' of driving for Defendants."

INTERROGATORY NO. 2

Please identify all information supporting your contention in paragraph 30 of the Complaint that "the specific examples of income levels are fabricated by Defendants or generated by the inclusion of facts, known to be false at the time stated, that would result in false representations about the income levels actually achieved."

INTERROGATORY NO. 4

Please identify all information supporting your contention in paragraph 30 of the Complaint that "persons leasing trucks do not have the opportunity to make more money than company drivers."

Other interrogatories in dispute include some that are classic instances of obtaining the opposition's application of law to fact, a permissible subject under Rule 33(a)(2), but one routinely ordered deferred until later in discovery:

Opportunity to McKay:

INTERROGATORY NO. 5

Please identify all information supporting your contention in paragraph 4 of the Complaint that "the Driving Opportunity is a franchise and/or business opportunity under federal . . . law," including, but not limited to, the provisions of federal law you contend are implicated.

INTERROGATORY NO. 6

Please specifically identify "the terms and conditions under which ENGLAND and HORIZON require the Drivers to train,

> perform, work, and pay fees" that, in conjunction with the ICOA and the VLA, "constitute a 'business opportunity' and/or 'seller assisted marketing plan' under federal law, California law, Utah law, and Indiana law."

The principal problem with the England Defendants' position, however, is even more fundamental. They have acknowledged several times that their main purpose in serving the contention interrogatories is to aid in preparing their witnesses for their depositions. (Goode Decl. ¶¶ 11, 13, and 15 and Exhs. H, I, and K.) This too is fundamentally unfair. The England Defendants' witnesses already have the advantage of access to and control over the information in their documents and electronic records. By demanding answers to the contention interrogatories before the depositions are taken, the England Defendants seek to magnify that advantage by learning—from responses to contention interrogatories—what Plaintiffs think is significant about the content of the England Defendants' records that bear on allegations of the Third Amended Complaint.[9]

If the Court adopts Plaintiffs' proposed July 31, 2013 deadline for answering the contention interrogatories, the England Defendants will have abundant opportunities to evaluate Plaintiffs' contentions on key factual and legal issues before the proposed October 23, 2013 deadline for the England Defendants' brief opposing class certification [Dkt. 115, pg. 4], and even more time to use what they have learned from the responses in preparing a summary judgment filing for the proposed deadline, which is proposed to be triggered by the date Judge Shelby decides the class certification issue.[10] In contrast, Plaintiffs have only one opportunity to

[9] If Plaintiffs were inclined to gamesmanship, we might consider serving placeholder responses to the contention interrogatories (as the defendants originally did in this matter), and supplementing them after the depositions with the "real" responses based on analysis of the evidence. We are not so inclined, and in any event wasteful multiple rounds of answers to contention interrogatories are one specific reason the courts disfavor them early on in any litigation.

[10] On February 15, 2013, the parties filed a joint motion [Dkt. 115] seeking to modify the Second Amended Scheduling Order [Dkt.110] and on March 7, 2013, they supplied the Court with a proposed Third Amended Scheduling Order. The dates used in this brief are based on the proposals in that motion.

depose the England witnesses. Those witnesses should not be given advance knowledge about the facts that Plaintiffs' counsel believes provide significant support to the Plaintiffs' factual allegations before the witnesses testify.

It is understandable why counsel might desire to prepare witnesses for deposition using the opposition's selection of the most important evidentiary facts produced by the side presenting the deposition witnesses. Notably, however, such a desire is not among the four specific reasons that can justify compelling early answers to interrogatories under the *Convergent Technologies* standard. Indeed, none of those four reasons warrants requiring Plaintiffs to provide their answers now.

Aside from deposition preparation, the England Defendants' emphasis in the meet and confer negotiations has been on the conclusory assertion that under Fed. R. Civ. P. 11, "Defendants are entitled to know the factual basis Plaintiffs had for these allegations at the time they filed their Third Amended Complaint." (Goode Decl. ¶ 15 and Exh. K.) True enough, Rule 11 exists, but that fact alone does not mean that every case warrants discovery into pre-filing knowledge, let alone discovery through the disfavored means of early-stage contention interrogatories. If the England Defendants are correct and the mere mention of Rule 11 justified requiring immediate answers to contention interrogatories, there would be no limit on the use of contention interrogatories – contrary to the express reservation in Rule 33(a)(2) of judicial power to defer answers. Moreover, Rule 11 does not require absolute factual support for every allegation. Instead, Rule 11 permits pleading in good faith on information and belief and provides parties an opportunity to discover evidence supporting such allegations. *See* Fed. R. Civ. P. 11(b)(3).

Instead, the *Convergent Technologies* standard provides a practical approach to contention interrogatories that are sought to be justified with reference to Rule 11.[11] To satisfy that standard, defendants must specifically show good reason to believe that having ***early*** answers to the 19 interrogatories they identify will "expose a substantial basis for a motion under Rule 11[.]" 108 F.R.D. at 338-39. To date, defendants have provided no such explanation. In the meet and confer process, the England Defendants furnished no reason of any kind to conclude that the allegations targeted by these 19 interrogatories are factually infirm. By relying so heavily on formulaic references to Rule 11 as a basis for requiring early answers to contention interrogatories, the England Defendants are promoting satellite litigation over Rule 11, an issue that is itself rarely anything more than satellite litigation.

Requiring immediate answers to the 22 interrogatories also will not serve the underlying purposes of the first and second *Convergent Technologies* factors: "clarifying the issues in the case, [or] narrowing the scope of the dispute." 108 F.R.D. at 338. Early answers certainly will not facilitate narrowing issues through summary judgment: if early answers were ordered and the England Defendants used them to support a summary judgment motion, we assure this Court that Plaintiffs would respond with a fully-justified motion under Fed. R. Civ. P. 56(d), because this case simply will not be ripe for summary judgment—if it ever is—until discovery is complete. Nor have the England Defendants explained to Plaintiffs how any issues that need to be "clarified" would be aided by immediate answers to the 22 contention interrogatories at issue.

[11] In their meet-and-confer communications, the England Defendants have cited three cases to support their invocation of Rule 11 as a justification for immediate answers to the contention interrogatories. *Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 544-45 (D. Kan. 2006); *Wagner v. St. Paul Fire & Marine Ins. Co.*, 238 F.R.D. 418, 427 (N.D. W.Va. 2006); *Cable & Computer Techs. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 653 (C.D. Cal. 1997). With all due respect, these cases are not persuasive in this context, because those decisions do not develop the careful balancing of interests both for and against early answers to contention interrogatories that informs the *Convergent Technologies* approach. Indeed, unlike most courts that evaluate disputes over contention interrogatories, *Johnson* and *Wagner* do not even mention the highly-influential opinion in *Convergent Technologies*.

Indeed, it is hard to imagine any case in which answers to contention interrogatories would "clarify" or "narrow" the issues when dozens of key witness depositions remained to be taken.

Finally, we do not think we are being overly pessimistic when we say that early answers to the interrogatories will not serve the last *Convergent Technologies* factor – promoting early settlement discussions. Certainly, the England Defendants have not even hinted during the meet and confer process that a desire to kick-start settlement negotiations is motivating the contention interrogatories (and their emphasis on Rule 11 suggests that settlement is the furthest thing from their mind).

CONCLUSION

For the reasons stated in this brief, plaintiffs Charles Roberts and Kenneth McKay, individually and on behalf of all others similarly situated, respectfully request that the Court enter a protective order giving them up to and including **July 31, 2013** to provide substantive responses with respect to the 22 contention interrogatories identified on **Exhibit 1** to this brief.

Dated this 22nd day of March, 2013

KRAVIT, HOVEL & KRAWCZYK S.C.

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