

1 KAREN J. KUBIN (SBN 71560)
HEATHER BURROR (205803)
2 JILL VIZAS (226984)
AKIN GUMP STRAUSS HAUER & FELD LLP
3 580 California Street, Suite 1500
San Francisco, CA 94104-1036
4 Telephone: 415-765-9500
Facsimile: 415-765-9501

5 BRUCE JACOBS (SBN 194114)
6 AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East, Suite 2400
7 Los Angeles, CA 90067-3012
Telephone: 310-229-1000
8 Facsimile: 310-229-1001

9 Attorneys for Defendant
EGL, INC.

10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
14

15 MOHIT NARAYAN, HANNA RAHAWI,
and THOMAS NARAYAN, on behalf of
16 themselves, all others similarly situated, and
the general public,

17 Plaintiffs,

18 v.

19 EGL, INC., a Texas Corporation; EAGLE
20 FREIGHT SERVICES, INC.; and DOES 1-
21 10, inclusive,

22 Defendants.

Case No. C 05-04181 RMW

**DEFENDANT EGL, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT
ON PLAINTIFF MOHIT NARAYAN'S
INDIVIDUAL CLAIMS**

Date: January 26, 2007

Time: 9:00 a.m.

Ctrm: 6

TABLE OF CONTENTS

1

2

3 I. INTRODUCTION..... 1

4 II. STATEMENT OF FACTS..... 1

5 A. The Parties..... 1

6 1. Eagle Is A Global Logistics Company Providing Domestic Delivery

7 Services. 1

8 2. Narayan’s Trucking Business, “MCAC Transfer.” 3

9 B. The Agreements Entered Into Between Narayan and Eagle Establishing

10 Narayan’s Independent Contractor Relationship With Eagle..... 3

11 C. The Contractor-Customer Relationship Between Narayan And Eagle. 5

12 III. APPLICABLE LAW. 7

13 IV. SUMMARY OF THE ARGUMENT..... 8

14 V. ARGUMENT. 9

15 A. Standard for Summary Judgment..... 9

16 B. Summary Judgment Is Mandated Because Narayan Was An Independent

17 Contractor. 9

18 1. The Agreements Between Narayan And EGL Establish That Narayan

19 Was An Independent Contractor..... 11

20 2. There Is No Evidence Of Control Outside Of The Agreements Between

21 Narayan And Eagle..... 13

22 3. Narayan Was An Independent Contractor Under California Law. 16

23 C. All Of Narayan’s Claims Fail As A Matter Of Law Because Narayan Was An

24 Independent Contractor. 17

25 VI. CONCLUSION 18

26

27

28

TABLE OF AUTHORITIES

Page(s)

CASES

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

ABF Capital Corp. v. Osley
414 F.3d 1061 (9th Cir. 2005) 7

Anderson v. Liberty Lobby, Inc.
477 U.S. 242 (1986) 8, 9

Bates v. Industrial Accident Comm'n
156 Cal. App. 2d 713 (1958) 14, 15

Celotex Corp. v. Catrett
477 U.S. 317 (1986) 9

City of Paris v. Floyd
150 S.W.3d 224 (Tex. App. 2004) 12

Cook v. Nacogdoches Anesthesia Group
167 S.W.3d 476 (Tex. App. 2005) 12

Davis v. EGL Eagle Global Logistics LP
2006 WL 2631966, *1 (E.D. La. 2006)..... 13, 14

Durbin v. Culbertson County
132 S.W.3d 650 (Tex. App. 2004) 9, 10

Farrell v. Greater Houston Tranp. Co.
908 S.W.2d 1 (Tex. App. 1995) 11

First National Bank of Arizona v. Cities Service Co.
391 U.S. 253 (1968) 9

Indus. Indem. Exch. v. Southard
160 S.W.2d 905 (Tex. 1942) 9

Klaxon Co. v. Stentor Elec. Mfg. Co.
313 U.S. 487 (1941) 7

Limestone Prods. Distribution Inc. v. McNamara
71 S.W.3d 308 (Tex. 2002) 10, 12, 14, 15

Mary Kay Inc. v. Woolf
146 S.W.3d 813 (Tex. App. 2004) 8

Millsap v. Federal Express Corp.
227 Cal. App. 3d 425 (1991) 15

Mission Insurance Co. v. Workers Compensation Appeals Board
123 Cal. App. 3d 211 (1981) 15

Nedlloyd Lines B.V. v. Super. Ct.
3 Cal. 4th 459 (1992) 7

1 *Newspapers, Inc. v. Love*
 380 S.W.2d 582 (Tex. 1964).....10

2 *Northwinds Abatement, Inc. v. Employers Insurance of Wausau*
 3 258 F.3d 345 (5th Cir. 2001)10

4 *Patton v. Cox*
 276 F.3d 493 (9th Cir. 2002)7

5 *Tamez v. Southwestern Motor Transport, Inc.*
 6 155 S.W.3d 564 (Tex. App. 2004) 11, 14

7 *Texas A & M University v. Bishop*
 156 S.W.3d 580 (Tex. App. 2005)9

8 *Thompson v. Travelers Indem. Co.*
 9 789 S.W.2d 277 (Tex. 1990)..... 10, 12

10 *Weidner v. Sanchez*
 14 S.W.3d 353 (Tex. Ct. App. 2000)10

11 **STATUTES AND REGULATIONS**

12 49 C.F.R. § 376.11(c)(1)..... 14

13 49 C.F.R. § 376.12(e) 11

14 49 C.F.R. § 393..... 11

15 49 C.F.R. § 376.11(c)(1)..... 11

16 Cal. Bus. & Prof. Code §§ 17200 *et seq.* 16

17 Cal. Lab. Code § 221..... 16

18 Cal. Lab. Code § 223..... 16

19 Cal. Lab. Code § 226.7..... 16

20 Cal. Lab. Code §§ 400 *et seq.* 16

21 Cal. Lab. Code § 450..... 16

22 Cal. Lab. Code § 512..... 16

23 Cal. Lab. Code § 2802..... 16

24 **RULES**

25 Fed. R. Civ. P. 56(c) 8

26

27

28

1 **I. INTRODUCTION.**

2 Despite operating his own licensed trucking business, MCAC Transfer, which he used to
3 provide delivery services to defendant EGL, Inc. (“Eagle”), plaintiff Mohit Narayan (“Narayan”)
4 nevertheless brought this lawsuit asserting five employment law claims, all premised on the theory that
5 he was misclassified as an independent contractor, rather than an employee. But Narayan’s own
6 deposition testimony and the undisputed facts defeat any claim that Narayan was not properly
7 classified as an independent contractor, and his claims fail. Accordingly, Eagle is entitled to summary
8 judgment on Narayan’s claims.¹

9 **II. STATEMENT OF FACTS.**

10 **A. The Parties.**

11 **1. Eagle Is A Global Logistics Company Providing Domestic Delivery Services.**

12 Eagle is a global transportation, supply chain management and information
13 services company, providing logistics solutions for customers worldwide. (Declaration of Martha
14 DeLeon-Schmidt (“Schmidt Dec.”) filed herewith, ¶ 2.) Eagle provides value-added services beyond
15 those customarily provided by traditional air freight forwarders, ocean freight forwarders and customs
16 brokers to help customers streamline their supply chain, reduce their inventories, improve their
17 logistics information and provide them with more efficient and effective domestic and international
18 distribution strategies in order to enhance their profitability. (*Id.*) Eagle’s services include air and
19 ocean freight forwarding, customs brokerage, local pick-up and delivery service, materials
20 management, warehousing, trade facilitation and procurement and integrated logistics and supply chain
21 management services. (*Id.*, ¶ 3.) These services are provided through Eagle’s extensive network of
22 approximately 400 facilities, agents and distribution centers located in over 100 countries on six
23 continents. (*Id.*)

24
25
26 ¹ The first phase of this litigation deals solely with Plaintiffs’ individual claims. (*See Case*
27 *Management Order*, filed March 16, 2006.) Therefore, this motion for summary judgment is made as
28 to Narayan’s individual claims against Eagle and does not consider the claims alleged by Narayan on
behalf of a putative class.

1 One of the many areas of Eagle's business is domestic delivery services. (Schmidt Dec., ¶¶ 3,
2 4; Deposition of Mohit Narayan ("Narayan Dep."), 62:8-21.)² Domestic delivery services may be
3 provided either as part of Eagle's freight-forwarding operations or for customers requiring local pick-
4 up and delivery services. (Schmidt Dec., ¶ 4.) Eagle maintains a non-asset based philosophy and
5 structure across the board. (*Id.*, ¶ 5.) Accordingly, with some exceptions, Eagle does not generally
6 employ drivers or use Eagle-owned vehicles for pick-up and delivery services. (*Id.*) Instead, Eagle
7 contracts with trucking businesses, both large and small, to handle their pick-up and delivery services.
8 (*Id.*) These owner-operators ("Contractors") own, operate and maintain the vehicles used in their work
9 for Eagle, and may perform the services themselves or employ qualified drivers of their choice.
10 (Schmidt Dec., ¶ 6; Narayan Dep., 183:1-5, 229:11-230:20.)

11 Eagle and the Contractors benefit from a mutual business relationship. (Schmidt Dec., ¶ 6.)
12 They each profit or lose by meeting the delivery demands of Eagle's customers. (*Id.*) The Contractors
13 perform this service by obtaining delivery jobs from Eagle. (*Id.*) Contractors make themselves
14 available at their own discretion. (Schmidt Dec., ¶ 8; Narayan Dep., 213:9-21, 215:1-217:22.) At
15 certain times of the day, heavier volumes dictate more profitable opportunities than at other times of
16 the day. (Schmidt Dec., ¶ 8.) Contractors receive a percentage of the applicable tariff for each load.
17 (*Id.*, ¶ 7.)

18 Contractors arriving at the dispatch station and seeking business availability go to the dispatch
19 office. (Schmidt Dec., ¶ 9.) Dispatches are offered as a delivery packet that is normally grouped
20 geographically and sometimes includes customer time and delivery specific requirements. (*Id.*) At
21 times, Contractors will reject a delivery. (Narayan Dep., 101:2-23.) Once a Contractor obtains a
22 packet, he will review the manifests to determine how to route the deliveries in the packet. (Schmidt
23 Dec., ¶ 10; Narayan Dep., 365:23-367:13.) Pursuant to customer demand, the Contractor will attempt
24 to deliver the priority orders first. (*Id.*, ¶ 10.) The Contractor is completely on his own to determine
25 the manner and means by which he will perform the delivery orders. (*Id.*) After completing a priority

26
27 ² Excerpts from Narayan's deposition are attached as Exhibit A to the Declaration of Jill Vizas
28 ("Vizas Dec.") filed herewith. Exhibits to the Narayan deposition are attached as Exhibit B to the
Vizas Declaration.

1 delivery, Contractors generally inform the station that the delivery is complete to enable Eagle to
2 update customers regarding the status of priority deliveries. (*Id.*, ¶ 11.) Contractors also call the
3 station periodically to find out if there are any pick-up orders in their current vicinity. (*Id.*)

4 After completing the packet of deliveries, Contractors bring any pick-up orders back to the
5 station. (Schmidt Dec., ¶ 12.) Many Contractors also return to the station to submit their delivery
6 manifests because early receipt of manifests enables Eagle to ensure a quick payment to the
7 Contractors. (*Id.*) Based on the manifests, Eagle generates settlement reports, which the Contractors
8 review to ensure that the reports properly account for any special charges or specially-negotiated
9 delivery rates. (*Id.*)

10 **2. Narayan's Trucking Business, "MCAC Transfer."**

11 Narayan began his own trucking business at the beginning of 1998. (Narayan
12 Dep., 143:18-25.) Narayan named his trucking business MCAC Transfer, filing a fictitious business
13 name application and obtaining a license to do business under that name. (*Id.*, 29:20-23, 143:18-
14 144:153, 149:20-151:2, 151:13-152:3.) For the next year and a half, Narayan worked as an
15 independent contractor providing delivery services for two companies, Merchant Home Delivery and
16 GeoLogistics, through his trucking business, MCAC Transfer. (*Id.*, 51:1-22, 51:24-52:13, 144:8-
17 145:6.) But in mid-1999, Narayan began looking for new customers, hoping to find customers who
18 would pay more for his services than GeoLogistics did. Narayan met with Eagle's Sacramento station
19 manager and decided to sign a contract to provide delivery services as an independent contractor to
20 Eagle. (*Id.*, 52:17-53:3, 108:2-3.)

21 **B. The Agreements Entered Into Between Narayan and Eagle Establishing Narayan's**
22 **Independent Contractor Relationship With Eagle.**

23 Narayan and Eagle entered into two Agreements for Leased Equipment and
24 Independent Contractor Services, first on June 14, 1999 (the "Initial Agreement") and again on
25 May 12, 2000 (the "Second Agreement") (collectively, the "Agreements"). (Narayan Dep., 81:13-
26
27
28

1 82:25, 110:15-112:15; Exs. 298, 299.)³ The Agreements did not guarantee Narayan any amount of
2 work, and Narayan reserved the right to continue to contract with other companies. (*Id.*, 136:11-20.)
3 Under the Agreements, Narayan’s only compensation was a percentage of the tariff charged to a
4 customer by Eagle for each shipment picked up or delivered by Narayan or his employees. (*Id.*, 65:16-
5 21; Ex. 298, § 4.01, Ex. 299, § 4.01.) Narayan understood that because he was an independent
6 contractor, he was responsible for filing tax returns for his business and that Eagle would not withhold
7 any taxes from the delivery rates paid. (*Id.*, 155:1-17; Ex. 298, § 4.07, Ex. 299, § 4.09.)

8 The Agreements established an independent contractor relationship between Narayan and Eagle
9 whereby Narayan, as owner-operator of his trucking business, performed delivery services for Eagle.
10 (Narayan Dep. Exs. 298, 299.) The Initial Agreement stated that Narayan and Eagle intended “to
11 establish a relationship between Contractor and [Eagle] through which Contractor, as an independent
12 contractor, (i) leases a vehicle to [Eagle] and (ii) renders certain related pickup and delivery
13 services....” (*Id.*, Ex. 298, § I.) Similarly, the Second Agreement established Narayan and Eagle’s
14 intention to “create a vendor/vendee relationship between Contractor and [Eagle] through which
15 Contractor, as an independent business person, has the potential to realize a profit or loss by: leasing a
16 truck to [Eagle]; rendering certain pick-up and delivery related services...” (*Id.*, Ex. 299, § I.)

17 Under the Agreements neither Narayan nor anyone who worked for him was to be considered
18 an employee of Eagle or its customers. (Narayan Dep., 84:18-85:5; Ex. 298, § I, Ex. 299, § I.)
19 Narayan also agreed that “if at any time during the term of this agreement [Narayan] is of the opinion
20 that something other than an independent contractor relationship exists between [Narayan] and [Eagle],
21 [Narayan] shall immediately notify the manager of shared resources of Eagle.” (*Id.*, 114:25-115:11,
22 115:21-116:6; Ex. 299, § I (in bold).) Narayan did not do so. (*Id.*, 115:21-116:19.)

23 As an independent contractor, Narayan was responsible for supplying the truck and other tools
24 used to provide services to Eagle, such as a pallet jack, hand dolly and lift gate. (Narayan Dep., 184:1-
25 8, 185:7-18, 186:25-187:15; Ex. 298, § 2.05; Ex. 299, § 2.05.) Narayan was responsible for all of the
26

27 ³ The Agreements are generally referred to together because they contain largely the same
28 language.

1 costs and expenses of maintaining, repairing and operating his truck. (*Id.*, 105: 13-17; Ex. 298,
2 §§ 2.05, 2.06; Ex. 299, §§ 2.05, 2.06.) Narayan was also responsible for obtaining insurance policies
3 on his truck and the freight he carried. (*Id.*, Ex. 298, § 3.02, Ex. 299, § 3.02.)

4 Although Eagle retained the right to issue reasonable requirements regarding the results to be
5 accomplished under the Agreements, the Agreements required Narayan to exercise independent
6 discretion and judgment to determine the method, manner and means of his performance of his
7 obligations under the Agreements. (Narayan Dep. Ex. 298, § 2.02, Ex. 299, § 2.02.) The Agreements
8 expressly stated that “[C]ontractor shall exercise independent discretion and judgment to determine the
9 method, manner and means of performance of its contractual obligations under this Agreement” and
10 that Eagle would have no right to control Narayan’s vehicle. (*Id.*) Narayan’s exercise of independent
11 discretion and judgment included whether or not to accept or reject dispatches, the days and times
12 Narayan would operate his vehicle, the routes he would travel, where he would park, and the repair and
13 maintenance of his vehicle. (*Id.*, 101:24-103:7; Ex. 298, § 2.02, Ex. 299, § 2.02.)

14 Narayan understood that many of the provisions in the Agreements were dictated by federal
15 law, and that as the driver of a commercial motor vehicle he would have to comply with applicable
16 U.S. Department of Transportation (“DOT”) regulations. (Narayan Dep., 67:11-18, 72:13-19; Ex. 298,
17 § 2.07, Ex. 299, § 2.07.) Narayan understood that Eagle’s drug and safety policies were also mandated
18 by the DOT. (*Id.*, 76:17-77:2; Ex. 298, § 2.07, Ex. 299, § 2.07.) Narayan also understood that any
19 drivers he hired to assist him with his business would also be subject to DOT regulations. (*Id.*, 105:25-
20 106:20; Ex. 298, § 2.09, Ex. 299, § 2.09.)

21 **C. The Contractor-Customer Relationship Between Narayan And Eagle.**

22 Narayan continued to do business as MCAC Transfer and to operate as an independent
23 contractor after he entered into the Agreements with Eagle. (Narayan Dep., 144:8-145:6.) Indeed,
24 Narayan identified himself as the owner-operator of MCAC Transfer, a business providing services to
25 Eagle, on EEO compliance certificates he submitted to Eagle on behalf of MCAC Transfer in 2000 and
26 again in 2002. (*Id.*, 165:8-16, 167:3-19, 168:11-169:5; Exs. 312, 313.) Narayan also placed MCAC
27 Transfer logos on his truck because, in his words, “if you’re supposedly an independent you are
28

1 supposed to have your name on there, your business name on there. And that's why I put it on there
2 basically. That was a Department of Transportation telling me that." (*Id.*, 27:14-28:8.)

3 Consistent with his status as an independent contractor, Narayan conducted his business
4 independently, exercising his own independent judgment and discretion to make decisions regarding all
5 aspects of his business. Narayan selected his own trucks and equipment, choosing to lease his trucks
6 but purchasing his other equipment, such as his pallet jack, hand dolly and lift gate, which allowed him
7 to handle lift gate pick-up and deliveries, which paid more. (Narayan Dep., 183:1-5, 184:1-8, 185:12-
8 18, 185:19-186:4.) Narayan also decided how and when he could make deliveries for Eagle, choosing
9 which days and times to make his truck available for them. Narayan's driver log reflects that he
10 arrived at the station at different times each day, and that some days he did not make himself available
11 to EGL at all. (*Id.*, 204:14-205:1, 213:9-21, Ex. 323.) Narayan accepted weekend work between 50
12 and 60 percent of the time it was offered to him. (*Id.*, 215:12-216:12, 216:21-25, 217:1-8.) There were
13 no adverse consequences for declining work. (*Id.*, 216:17-20.) Indeed, some days Narayan called in to
14 see what type of freight was available that day and what the rate was before going to the station and,
15 during the last three years, increasingly decided not to go to the station at all. (*Id.*, 101:2-23, 130:17-
16 21, 131:8-23.)

17 When he chose to accept dispatches, Narayan determined how to load his truck based on the
18 shipment priority and the geographic area of the deliveries. (Narayan Dep., 242:16-24, 365:23-
19 367:13.) Narayan also decided the order in which to deliver the shipments. (*Id.*, 365:23-367:13.) If a
20 dispatch contained several priority shipments, Narayan would determine the best way to deliver them
21 all on time. (*Id.*) Occasionally Narayan determined that he could not deliver all of the priority
22 shipments in time, and asked the dispatcher for a different shipment. (*Id.*) Narayan also rejected
23 particular deliveries when they were out of his delivery area and would not be as profitable. (*Id.*,
24 245:11-246:3.)

25 Narayan's compensation varied with the amount of work he chose to accept. (Narayan Dep.,
26 164:8-17.) Under the Agreements, Narayan was entitled to receive 65% of the tariff rate for each pick-
27 up and delivery that he performed. (*Id.*, 65:16-21, Exs. 298, 299.) Sometimes if there were no other
28

1 contractors available for a delivery, Narayan was able to negotiate for more money. (*Id.*, 368:8-12.)
2 Narayan also understood that he could potentially increase his income by hiring another driver or other
3 employees to assist with deliveries, but he chose not to. (*Id.*, 229:2-6, 229:11-230:20.) Eagle reported
4 the money it paid Narayan on a Form 1099. (*Id.*, 155:1-7.) Narayan never received a Form W-2 from
5 Eagle. (*Id.*, 155:8-10.)

6 **III. APPLICABLE LAW.**

7 This Court should apply Texas law in interpreting the Agreements and deciding this motion. As
8 noted above, all of Narayan's claims are premised on the theory that the Agreements misclassified him
9 as an independent contractor. (FAC, ¶ 27.) The Agreements provide that they "shall be interpreted
10 under the laws of the state of Texas." (Narayan Dep., Ex. 298, § 7.03, Ex. 299, § 7.03.)

11 Federal courts apply the choice of law rules of the forum state to determine what substantive
12 law should be used. *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir.2002) (citing *Klaxon Co. v. Stentor Elec.*
13 *Mfg. Co.*, 313 U.S. 487 (1941)). California courts apply "the principles set forth in Restatement section
14 187, which reflect a strong public policy favoring enforcements of such provisions." *Lines B.V. v.*
15 *Super. Ct.*, 3 Cal.4th 459, 465 (1992). Under this approach, courts first examine whether the chosen
16 state has a substantial relationship to the parties or to the transaction, or whether there is another
17 reasonable basis for the parties' choice of law. *Id.* at 466. "A substantial relationship exists where one
18 of the parties is domiciled or incorporated in the chosen state." *ABF Capital Corp. v. Osley*, 414 F.3d
19 1061, 1065 (9th Cir. 2005) (citing *Nedlloyd Lines B.V.*, 3 Cal. 4th at 467. Eagle is domiciled in the
20 state of Texas. (Narayan Dep., Exs. 298, 299, § 1.) Thus, there is a reasonable basis for the parties'
21 choice of Texas law.

22 California courts also consider whether the application of another state's law "is contrary to a
23 *fundamental* policy of California." *Nedlloyd Lines B.V.*, 3 Cal.4th at 466 (emphasis in original). The
24 threshold issue in the present case is whether Narayan was properly classified as an independent
25 contractor. California does not have a fundamental public policy regarding the classification of its
26 contractors. *See Mary Kay Inc. v. Woolf*, 146 S.W.3d 813, 817 (Tex. App. 2004) (applying Texas law to
27 decide whether a Mary Kay consultant who worked in California was an independent contractor or an
28

1 employee, where there was a Texas choice of law clause in the contract.) Moreover, Texas law
2 regarding the classification of independent contractors is substantially similar to California law (*see*
3 Section V.B.3 *infra*), and thus application of Texas law cannot be contrary to fundamental California
4 policy. Texas law applies.

5 **IV. SUMMARY OF THE ARGUMENT.**

6 The material facts are undisputed; Eagle is entitled to judgment as a matter of law and its
7 motion for summary judgment should be granted. Narayan's claims are all premised on the theory that
8 he was misclassified as an independent contractor when he was really an employee of Eagle.
9 Narayan's theory is flawed.

10 Under Texas law, courts determine independent contractor status by looking to the agreement
11 between the parties. In some instances, courts will look outside of the parties' agreement to determine
12 whether the alleged employer had the right to control the progress of the work, rather than just the final
13 outcome. As noted above, the Agreements here clearly stated that Narayan was an independent
14 contractor. Moreover, Narayan retained the right to control the progress of his own work, and Eagle
15 only controlled the final outcome. Thus, Narayan was properly classified as an independent contractor
16 and his employment claims fail as a matter of law.

17 **V. ARGUMENT.**

18 **A. Standard for Summary Judgment.**

19 Summary judgment is appropriate where "there is no genuine issue as to any material
20 fact and . . . the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby,*
21 *Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)). The moving party is entitled to
22 judgment as a matter of law if the nonmoving party "fails to make a showing sufficient to establish the
23 existence of an element essential to that party's case, and on which that party will bear the burden of
24 proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). There is no genuine issue unless
25 "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."
26 *Anderson*, 477 U.S. at 249 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253,
27 288-89 (1968)). "When the material underlying facts are not in dispute and can give rise to only one
28

1 reasonable conclusion, whether a worker was an employee or an independent contractor is a question
2 of law.” *Texas A & M University v. Bishop*, 156 S.W.3d 580, 584 (Tex. App. 2005) (citing *Indus.*
3 *Indem. Exch. v. Southard*, 160 S.W.2d 905, 906 (Tex. 1942)).

4 As demonstrated below, Narayan lacks the evidence necessary to prove any of his claims.
5 Accordingly, summary judgment should be granted for EGL.

6 **B. Summary Judgment Is Mandated Because Narayan Was An Independent**
7 **Contractor.**

8 All of Narayan’s claims are premised on the theory that he was misclassified as an
9 independent contractor, rather than as an employee. An independent contractor is one “who, in the
10 pursuit of an independent business, undertakes to do a specific piece of work for other persons, using
11 his own means and methods, without submitting himself to their control in respect to all its details.”
12 *Durbin v. Culbertson County*, 132 S.W.3d 650, 658 (Tex. App. 2004) (citations omitted). Courts
13 generally look to the parties’ agreement in determining the relationship between the parties. *Id.* at 659.
14 Here, the Agreements clearly establish that Narayan was an independent contractor. Narayan agreed
15 that he was not an employee of Eagle; he was to provide his own vehicle; he was to control the means,
16 manner and method of making deliveries; he could use his own employees or subcontractors over
17 whom he would exercise exclusive control; he was to be paid by the job; and his Eagle-derived income
18 was to be reported on a Form 1099, with Narayan solely responsible for the payment of income taxes,
19 among other things. (Ex. 298, §§ 1, 2.01, 2.02, 2.05, 2.09, 4.01, 4.07, Ex. 299, §§ 1, 2.01, 2.02, 2.05,
20 2.09, 4.01, 4.09.)

21 Even if this Court looks beyond the Agreements, there can be no doubt that Narayan was
22 correctly classified as an independent contractor. When looking beyond the parties’ contractual
23 agreement to determine whether an independent contractor is correctly classified, courts will examine
24 which party has the right to control the progress, details, and methods of the operations of the work.
25 *Thompson v. Travelers Indem. Co.*, 789 S.W.2d 277, 278 (Tex. 1990) (citing *Newspapers, Inc. v. Love*,
26 380 S.W.2d 582, 585-90 (Tex. 1964)). To measure the right to control, courts consider the following
27 five factors: (1) the independent nature of the contractor’s business; (2) the contractor’s obligation to
28

1 furnish necessary tools, supplies, and materials to perform the job; (3) the contractor's right to control
 2 the progress of the work except about final results; (4) the time for which the contractor is employed;
 3 and (5) the method of payment, whether by unit of time or by the job. *Limestone Prods. Distribution*
 4 *Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (citations omitted). As will be shown below, an
 5 analysis of these five factors demonstrates that Eagle did not exert a "right to control" over Narayan
 6 and that he was properly classified as an independent contractor.

7 **1. The Agreements Between Narayan And EGL Establish That Narayan Was**
 8 **An Independent Contractor.**

9 In determining whether a party is an independent contractor, courts will first
 10 look to whether the party has described itself as an independent contractor under the applicable
 11 agreement. "[G]enerally, an agreement providing that a person shall be an independent contractor and
 12 providing for no right of control is controlling in determining the relationship between the parties."
 13 *Durbin*, 132 S.W.3d at 659 (citations omitted) (agreement that "Independent Contractor stipulates and
 14 agrees that he shall not be deemed an agent, servant or employee of the COUNTY" controlling). "A
 15 written contract that expressly provides for an independent contractor relationship is determinative of
 16 the parties' relationship in the absence of extrinsic evidence indicating that the contract was a
 17 subterfuge, that the hiring party exercised control in a manner inconsistent with the contract provisions,
 18 or if the written contract has been modified by a subsequent agreement, either express or implied."
 19 *Northwinds Abatement, Inc. v. Employers Insurance of Wausau*, 258 F.3d 345, 351 (5th Cir. 2001)
 20 (citing *Weidner v. Sanchez*, 14 S.W.3d 353 (Tex. Ct. App. 2000) (applying Texas law in deciding that
 21 contract stating that Wausau was an independent contractor and not an agent was controlling)).

22 As shown above, the Agreements established an independent contractor relationship between
 23 Narayan and Eagle whereby Narayan, as owner-operator of the trucking business MCAC Transfer,
 24 performed delivery services for Eagle. The Agreements unambiguously state that Narayan is an
 25 independent contractor, and that "neither contractor nor any of its employees or agents shall be
 26 considered to be employees of EFS or of EFS customers at any time under any circumstances for any
 27
 28

1 purpose whatsoever.” (Ex. 298, § I, Ex. 299, § I.) Accordingly, Narayan was an independent
2 contractor under the Agreements.

3 Further, Eagle did not have the right to control Narayan under the Agreements. To the contrary,
4 the Agreements required Narayan to “exercise independent discretion and judgment to determine the
5 method, manner and means of performance” of the contractual obligations under the Agreement. (Ex.
6 298, § 2.02, Ex. 299, § 2.02.)

7 Although Narayan complains that Eagle exercised control over him through several provisions
8 in the Agreements, such requirements are necessary to comply with applicable law. For example,
9 Narayan complains that the Agreements required his vehicle to be marked to identify EGL as a
10 licensed motor carrier. But, this requirement is necessary to comply with federal regulations
11 promulgated under the Motor Carrier Safety Improvement Act of 1999. *See* 49 C.F.R. § 376.11(c)(1).
12 Similarly, the provisions specifying that the Contractor is responsible for certain costs and expenses
13 relating to the leased vehicle and that any such payments advanced by Eagle shall be deducted from
14 the Contractor’s compensation are also required by federal regulation. *See* 49 C.F.R. § 376.12(e)
15 (requiring a clear specification of responsibility for certain costs and expenses); 49 C.F.R. § 376.12(h)
16 (requiring a clear specification of all items that may be initially paid for by a motor carrier and then
17 deducted from the contractor’s compensation). Likewise, the provision allowing Eagle to remove a
18 vehicle from service if it is not in compliance with these and other federal or state requirements is also
19 mandated by federal regulation. *See* 49 C.F.R. § 393 (prohibiting motor carriers from allowing drivers
20 to operate commercial motor vehicles that are not in compliance).

21 Requiring a driver to comply with regulations “does not have any impact on the type of
22 relationship that exists between the carrier-lessee and the contractor-lessor.” *Tamez v. Southwestern*
23 *Motor Transport, Inc.*, 155 S.W.3d 564 (Tex. App. 2004); *see also Farrell v. Greater Houston Transp.*
24 *Co.*, 908 S.W.2d 1 (Tex. App. 1995) (finding a taxicab driver an independent contractor even though a
25 city ordinance provided that the permit holder was responsible for anyone operating the taxicabs).
26 Here, the Agreements clearly established an independent contractor relationship between Narayan and
27 Eagle, and the mere fact that the Agreements required Narayan to comply with applicable law is not
28

1 inconsistent with his independent contractor status under *Tamez*. Accordingly, summary judgment
2 should be granted for Eagle.

3 **2. There Is No Evidence Of Control Outside Of The Agreements Between**
4 **Narayan And Eagle.**

5 Even if this Court looks outside the Agreements, there is no evidence that Eagle
6 controlled the progress of Narayan's work. Before Eagle may be considered Narayan's employer,
7 Eagle's "exercise of control must be so persistent and the acquiescence therein so pronounced as to
8 raise an inference that, when the incident occurred, the parties by implied consent had agreed that the
9 principal had the right to control the details of the work." *City of Paris v. Floyd*, 150 S.W.3d 224, 227
10 (Tex. App. 2004). "An employer controls not merely the end sought to be accomplished, but also the
11 means and details of its accomplishment." *Cook v. Nacogdoches Anesthesia Group*, 167 S.W.3d 476,
12 481 (Tex. App. 2005) (citing *Thompson*, 789 S.W.2d at 278 (finding that an anesthesiologist who had
13 discretion in how to conduct his job and was provided equipment by the hospital and not the group he
14 contracted with was an independent contractor, despite the fact that the group told him when to be at
15 the hospital for his anesthesia services)).

16 Addressing a similar situation, the Texas Supreme Court recently concluded that a contract
17 driver was an independent contractor as a matter of law. *See Limestone Prods. Distribution Inc.*, 71
18 S.W.3d 308. In *Limestone*, the court utilized the five-factor test described above to determine whether
19 a truck driver was an employee or an independent contractor. *Id.* at 312. As here, the contractor
20 owned his own truck, could drive any route he wished, was only required to deliver the load on time,
21 had his income reported on a Form 1099, and had to pay his own taxes and expenses. *Id.* at 312-313.
22 The *Limestone* court concluded that the truck driver was an independent contractor:

23 Limestone supplied no tools or equipment to Mathis. Instead, Mathis owned and
24 used his own truck for deliveries, and he paid for his truck's gasoline, repairs and
25 insurance. Limestone paid Mathis by the load he delivered, and he received no
26 pay if there was no work. Limestone reported Mathis's income on a 1099 form,
not a W-2 form. Also, Limestone did not pay Mathis for vacation, sick leave, or
holidays. And Mathis paid his own social security and federal income taxes.

27 [T]he summary-judgment evidence establishes that Limestone merely controlled
the end sought to be accomplished—determining where and when to deliver the

1 load—whereas Mathis controlled the means and details of accomplishing the
2 work.

3 *Id.*

4 Indeed, in a case against Eagle involving effectively the same agreement as that at issue here,
5 the U.S. District Court for the Eastern District of Louisiana just this year applied *Limestone* to hold
6 that an owner-operator under contract with Eagle was properly classified as an independent contractor
7 and was not an employee. *See Davis v. EGL Eagle Global Logistics LP*, 2006 WL 2631966, *1 (E.D.
8 La. 2006). The court explained:

9 He was not guaranteed a certain amount of work and was free to serve other
10 carriers. He could, as he saw fit, employ drivers and control the aspects of their
11 work. It was Davis' decision to accept or reject dispatches offered by EGL. He
12 had the right to control the progress of the work, including that he could generally
13 choose the day and time of day to make deliveries. He could choose the routes
14 traveled and the parking sites most suitable to accomplish his task. He could
15 arrange for repair of his vehicle, which he leased to EGL. This control exercised
16 by Davis was not undermined by the Agreement's qualification of this right to
17 control, which provided merely that he "fully and efficiently perform his
18 obligation under the Agreement."

19 *Id.* at *3-*4. Other factors on which the court relied in reaching this conclusion in *Davis* were that the
20 plaintiff was compensated per delivery rather than paid on an hourly or salaried basis, he was not
21 entitled to receive any benefits or compensation beyond the 60% of the tariff of each shipment picked
22 up and delivered, and Eagle did not withhold income or social security taxes; rather, he was
23 responsible for paying his own taxes. *Id.*

24 The facts here are the same as in *Limestone* and *Davis*, and the same analysis applies. Narayan,
25 like the drivers in those cases, was required to furnish his own truck, the major tool of his trade, as well
26 as his own pallet jack, hand dolly and lift gate. (Narayan Dep., 183:1-5, 184:1-8, 185:19-186:4.)
27 Narayan was also responsible for the costs of operating and maintaining his vehicle, including
28 gasoline, repairs and insurance. (*Id.*, 105:13-17; Exs. 298, 299, § 2.05.) Narayan was not guaranteed
any amount of work and was free to do business with other companies. (*Id.*, 136:11-20.) Narayan was
paid a percentage of the tariff Eagle received for the loads he carried, and he received no pay if there
was no work. (*Id.*, 65:16-21.) Narayan received a Form 1099 from Eagle, not a W-2, and he paid his
own taxes. (*Id.*, 155:1-17.) Additionally, Narayan operated under the business name MCAC Transfer,

1 a separately licensed business, and he was free to hire others to assist him with his business. (*Id.*,
 2 29:20-23, 229:11-230:20.) Narayan did not have to show up at the station on a regular schedule, and
 3 indeed, there were many days when he chose not to show up at all. (*Id.*, 204:14-205:1, 213:9-21.)
 4 Narayan also chose his own route and was free to reject deliveries, which he routinely did. (*Id.*, 131:8-
 5 23, 101:24-103:7.) Eagle merely controlled the end sought to be accomplished—delivering freight in
 6 accordance with customer specifications—whereas Narayan controlled the means and details of
 7 accomplishing the work.⁴

8 In sum, all of the factors set forth in *Limestone* and applied in *Davis* compel the conclusion that
 9 Narayan was properly classified as an independent contractor and his claims against Eagle cannot
 10 stand. Summary judgment is mandated.

11 3. Narayan Was An Independent Contractor Under California Law.

12 Even if California law applied, Narayan was properly classified as an
 13 independent contractor. California law is substantially similar to Texas law regarding classification of
 14 an independent contractor; under both, a “right to control” test is used to determine whether an
 15 independent contractor is properly classified. *Compare Limestone Prods. Distribution Inc.*, 71 S.W.3d
 16 at 312 (right to control the progress, details, and methods of the operations of the work) *with Bates v.*
 17 *Industrial Accident Comm’n*, 156 Cal. App. 2d 713, 718 (1958) (independent contractor relationship
 18 will not be considered employment relationship unless the alleged employer has the right “to exercise
 19 complete and authoritative control of the mode and manner in which the work is performed”).

21
 22 ⁴ Narayan contends that Eagle exercised control over him by requiring him to place an Eagle
 23 logo on his truck and to wear an Eagle uniform (an Eagle shirt and security badge) when making
 24 deliveries. But, as shown above, motor carrier identifying information is required by federal
 25 regulation. *See* 49 C.F.R. § 376.11(c)(1) (requiring leased vehicles to be marked with the motor
 26 carrier’s identifying information); *see also Tamez v. Southwestern Motor Transport, Inc.*, 155 S.W.3d
 27 564 (Tex. App. 2004) (requiring driver to comply with federal or state regulations “does not have any
 28 impact on the type of relationship that exists between the carrier-lessee and the contractor-lessor”).
 Moreover, Narayan admits that the Eagle logo did not stop him from using his truck to make deliveries
 for others and that he could have covered the logo, but chose not to do so. (Narayan Dep., 24:19-22,
 25:6-21, 38:22-24.) Further, Narayan admits Eagle’s security concerns, which necessitated the use of
 security badges to enter the station, were legitimate. (*See id.*, 19:18-20:8.) Examining such
 requirements in *Davis*, the court held that they did not “create a factual dispute” and were “not at all
 inconsistent with independent contractor status.” *Davis*, 2006 WL 2631966, at *3-*4.

1 As discussed above, Texas courts analyze the “right to control” by considering: (1) the
2 independent nature of the contractor’s business; (2) the contractor’s obligation to furnish necessary
3 tools, supplies, and materials to perform the job; (3) the contractor’s right to control the progress of the
4 work except about final results; (4) the time for which the contractor is under contract; and (5) the
5 method of payment, whether by unit of time or by the job. *Limestone Prods. Distribution Inc.*, 71
6 S.W.3d at 312. California courts consider similar factors in determining the “right to control.” For
7 example, in *Millsap v. Federal Express Corp.*, 227 Cal. App. 3d 425, 430-33 (1991), the court held that
8 a package delivery driver was an independent contractor, not an employee, based on the parties’ written
9 agreement, which provided for an independent contractor relationship, as well as other factors, such as
10 the driver’s obligation to provide his own vehicle, gas and liability insurance and to pay for vehicle
11 maintenance and repair costs. The court also noted that the driver was paid on a “per route” basis
12 (rather than by the hour), and that the driver retained the right to control the progress of his work.
13 “Other than to say ‘be careful’ or to give him directions to a particular location, or possibly tell him to
14 deliver the packages in the order received, [the carrier] did not instruct [the driver] as to how to make
15 the deliveries or how to drive his car.” *Id.* at 431.

16 The court considered similar factors in *Bates*, 156 Cal. App. 2d 713, holding that the driver of a
17 catering truck was an independent contractor, not an employee: the driver controlled the day-to-day
18 operation of his route, was obligated to provide insurance and maintenance for his truck, and did not
19 receive an hourly wage. *Id.* at 718-19; *see also Mission Insurance Co. v. Workers Compensation*
20 *Appeals Board*, 123 Cal. App. 3d 211 (1981) (security alarm service provider an independent
21 contractor, not an employee, based on the parties’ agreement, the independent nature of the contractor’s
22 business, the contractor’s obligation to furnish his own vehicle and pay his own expenses, and the
23 method of payment). Thus, even under California law, Narayan was properly classified as an
24 independent contractor.

C. All Of Narayan’s Claims Fail As A Matter Of Law Because Narayan Was An Independent Contractor.

All of the provisions of the California Labor Code and Wage Order on which Narayan bases his First through Fourth Causes of Action apply only to employees, not to independent contractors.⁵ See Cal. Lab. Code §§ 221, 223, 226.7, 400-410, 450, 512, 2802; IWC Wage Order No. 9; see also FAC, ¶ 44, 45, 46, 47, 54 & 57. As demonstrated above, Narayan was an independent contractor, not an employee. Thus, the Labor Code and Wage Order provisions on which he relies do not apply to him, and his First through Fourth Causes of Action fail. And, because Narayan’s Ninth Cause of Action for violation of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, is wholly based on the violations alleged in his First through Fourth Causes of Action, the Ninth Cause of Action fails with them.

VI. CONCLUSION

Narayan’s own deposition testimony amply demonstrates that he was properly classified as an independent contractor, and his claims against Eagle fail. No material facts are in dispute, and Eagle is entitled to judgment as a matter of law. For all the foregoing reasons, Eagle’s motion for summary judgment should be granted.

Dated: December 8, 2006

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD LLP

By  _____
Karen J. Kubin

Attorneys for Defendant
EGL, INC.

⁵ Narayan did not join in the Fifth through Eighth Causes of Action contained in the First Amended Complaint.