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

15 MOHIT NARAYAN, HANNA RAHAWI,
and THOMAS HEATH, 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
REGARDING THE INDIVIDUAL
CLAIMS OF PLAINTIFF HANNA
RAHAWI**

Date: January 26, 2007
Time: 9:00 a.m.
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1 **I. INTRODUCTION.**

2 Plaintiff Hanna Rahawi (“Rahawi”), owner of an independent trucking business with two
3 trucks, signed two contracts to provide delivery services to Defendant EGL, Inc. (“Eagle”) as an
4 independent contractor. Rahawi admits that he did not want to be an employee of Eagle because he
5 made more money operating his own independent trucking business. Nevertheless, Rahawi joined this
6 lawsuit asserting employment law claims against Eagle, all premised on the flawed theory that Rahawi
7 was misclassified as an independent contractor, rather than an employee. But the undisputed facts
8 demonstrate that Rahawi was at all times during his relationship with Eagle an independent contractor,
9 just as his contract states. Accordingly, Eagle is entitled to summary judgment on Rahawi’s claims.¹

10 **II. STATEMENT OF FACTS.**

11 **A. The Parties.**

12 **1. Eagle Is a Global Logistics Company Providing Domestic Delivery Services.**

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

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 to
28 Rahawi’s individual claims against Eagle and does not consider the claims alleged by Rahawi 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.) Domestic delivery services may be provided either as part of Eagle's freight-forwarding operations
3 or for customers requiring local pick-up and delivery services. (*Id.*, ¶ 4.) Eagle maintains a non-asset
4 based philosophy and structure across the board. (*Id.*, ¶ 5.) Accordingly, with some exceptions, Eagle
5 does not generally employ drivers or use Eagle-owned vehicles for pick-up and delivery services. (*Id.*)
6 Instead, Eagle contracts with trucking businesses, both large and small, to handle its pick-up and
7 delivery services. (*Id.*) These owner-operators ("Contractors") own, operate and maintain the vehicles
8 used in their work for Eagle, and may perform the services themselves or employ qualified drivers of
9 their choice. (*Id.*, ¶ 6; Deposition of Hanna Rahawi ("Rahawi Dep."), 192:17-193:2, 199:4-7, 200:15-
10 19, 195:8-12.)²

11 Eagle and its 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. (*Id.*, ¶ 8; Rahawi Dep., 161:15-163:12.) At certain times of the day
15 heavier volumes dictate more profitable opportunities than at other times of the day. (Schmidt Dec.,
16 ¶ 8.) Contractors receive a percentage of the applicable tariff for each load. (*Id.*, ¶ 7.)

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

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

1 customers regarding the status of priority deliveries. (*Id.*, ¶ 11.) Contractors also call the station
2 periodically to find out if there are any pick-up orders in their current vicinity. (*Id.*)

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

9 2. Rahawi's Trucking Business.

10 Rahawi purchased a Mitsubishi truck and began his own truck driving business
11 in 1993 or 1994. (Rahawi Dep., 30:15-32:20.) Shortly thereafter he signed an independent contractor
12 agreement to provide delivery services for Cal State Express. (Rahawi Dep., 30:15-32:20.) Sometime
13 in 2000, Rahawi decided to expand his business to make more money by taking on weekend work.
14 (*Id.*, 44:9-46:25.) Another driver suggested that Eagle needed contractors to handle weekend
15 deliveries. (*Id.*) Rahawi began providing delivery services for Eagle on the weekends, and continued
16 providing delivery services for Cal State Express during the week. (*Id.*, 44:9-46:25, 54:14-55:4, 60:1-
17 7.) Rahawi understood that he was an independent contractor for Eagle, not an employee. (*Id.*, 54:14-
18 55:4.) Indeed, Rahawi did not want to become an employee because he could make more money
19 operating his own trucking business. (*Id.*, 68:17-23.) Although Rahawi later started providing delivery
20 services for Eagle during the week as well, he understood that he would continue to be an independent
21 contractor operating an independent trucking business, not an employee. (*Id.*, 62:20-64:2.)

22 B. The Agreements Entered Into Between Rahawi And Eagle Establishing Rahawi's 23 Independent Contractor Relationship With Eagle.

24 Rahawi and Eagle entered into two Agreements for Leased Equipment and Independent
25 Contractor services, first on May 11, 2000 and again on July 15, 2000 (collectively, the
26 "Agreements").³ (Rahawi Dep. Exs. 203, 204.) The Agreements did not guarantee Rahawi any

27
28 ³ The Agreements are referred to together because they contain virtually identical language.

1 amount of work, and Rahawi reserved the right to continue to contract with other companies, which he
2 did. (*Id.*, Ex. 204, § I, p.2; 44:9-46:25, 60:1-7, 188:23-189:2, 189:11-17.) Under the Agreements,
3 Rahawi would receive 60 percent of the amount charged to a customer by Eagle for each shipment
4 picked up or delivered by Rahawi or his employees, although he negotiated special rates for certain
5 deliveries. (*Id.*, Ex. 204, § 4.01; 94:4-13, 243:3-244:24.) Rahawi understood that because he was an
6 independent contractor, he was responsible for filing tax returns for his business and that Eagle would
7 report his income on a Form 1099 and would not withhold any taxes from the delivery rates paid. (*Id.*,
8 206:10-16, 245:5-9, 245:21-252:25; Ex. 204, § 4.09.) Rahawi also understood that, other than these
9 delivery rates, neither he nor his employees would receive benefits or any other form of compensation
10 from Eagle. (*Id.*, Ex. 204, § 4.09; 97:18-98:4, 188:2-6.)

11 The Agreements established an independent contractor relationship between Rahawi and Eagle
12 whereby Rahawi, as owner-operator of a trucking business, performed delivery services for Eagle.
13 (Rahawi Dep., 187:2-8, Exs. 203, 204, § I pp. 1-2.) The Agreements stated Rahawi 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 related pick-up and delivery services..." (*Id.*, Exs. 203, 204, § I.)
17 The Agreements could be terminated by either party after a notice period or upon breach of the
18 Agreements. (*Id.*, 214:13-215:7.) Because the Agreements did not obligate Rahawi to provide
19 delivery services on any given day, Rahawi was also free to put his contractual relationship with Eagle
20 on hold whenever he chose. (*Id.*, 283:18-285:19.) For example, Rahawi temporarily stopped
21 providing delivery services to Eagle to help his wife open a cell phone business, but reactivated his
22 contract a month later for income reasons. (*Id.*)

23 Under the Agreements neither Rahawi nor anyone who worked for him was to be considered an
24 employee of Eagle. (*Id.*, Exs. 203, 204, § I pp.1-2.) Rahawi also agreed that "if at any time during the
25 term of this agreement [Rahawi] is of the opinion that something other than an independent contractor
26 relationship exists between [Rahawi] and [Eagle], [Rahawi] shall immediately notify the manager of
27
28

1 shared resources of Eagle.” (*Id.*, Exs. 203, 204, p. 2; 188:11-18.) Rahawi never did so. (*Id.*, 170:9-
2 171:4.)

3 As an independent contractor, Rahawi was responsible for supplying the truck and other tools
4 used to provide services to Eagle. (Rahawi Dep., Ex. 204, §§ 2.01, 2.02.) Rahawi was responsible for
5 all of the costs and expenses of maintaining, repairing and operating his truck, including any damage
6 or depreciation. (*Id.*, Ex. 204, §§ 2.01, 2.02; 200:15-19, 206:6-9.) Rahawi was also responsible for
7 obtaining insurance policies on the truck and the freight he carried. (*Id.*, Ex. 204, § 3.02; 206:1-5,
8 274:25-275:6, 275:20-276:16.)

9 Although Eagle retained the right to issue reasonable requirements regarding the results to be
10 accomplished under the Agreements, the Agreements required Rahawi to exercise independent
11 discretion and judgment to determine the method, manner and means of his performance of his
12 obligations under the Agreements. (Rahawi Dep., Ex. 203, 204, pp. 1-2; 187:9-21.) The Agreements
13 expressly stated that “[C]ontractor shall exercise independent discretion and judgment to determine the
14 method, manner and means of performance of its contractual obligations under this Agreement.” (*Id.*,
15 Exs. 203 & 204, § I, pp. 1-2.) Accordingly, Rahawi controlled the operation of his vehicle, and was
16 responsible for complying with applicable federal and state regulations. (*Id.*, Ex. 204, §§ 2.03, 2.07;
17 192:17-193:2, 199:4-7, 200:20-201:2.) Eagle did not have any control over Rahawi’s vehicle, or over
18 any employees or subcontractors Rahawi chose to employ. (*Id.*, Ex. 204, §§ , I, 2.01, 2.09; 195:8-12.)

19 C. The Contractor-Customer Relationship Between Rahawi And Eagle.

20 Rahawi continued to conduct his trucking business after he entered into the Agreements
21 with Eagle, and identified himself as a small business concern on the EEO compliance certificates he
22 completed for Eagle. (Rahawi Dep., 255:3-258:5, 259:10-260:24; Exs. 228, 229, 230.) Rahawi owned
23 two trucks, and continued providing delivery services to Cal State Express by hiring a subcontractor to
24 drive his second truck. (*Id.*, 340:21-341:17.) Cal State Express paid Rahawi 25% of the amount
25 charged to the customer, and Rahawi paid his subcontractor half of what he received from Cal State
26 Express. (*Id.*, 341:23-342:18.)

1 Although Rahawi initially asked Eagle for a specific geographic area to which he could make
2 deliveries each day, after delivering to Dublin/Livermore and Oakland he realized he could make more
3 money if he was willing to make deliveries anywhere, which he started to do instead. (*Id.*, 70:9-19,
4 72:5-15, 76:20-78:1.) Rahawi also negotiated with Eagle regarding the deliveries he made to
5 maximize his profit. (*Id.*, 243:3-244:24.) Rahawi knew he could hire a subcontractor to drive for him
6 if he chose, but he chose not to do so. (*Id.*, 201:21-202:5.) Rahawi also knew he could expand his
7 trucking business by putting a third truck into service for Eagle (his second truck was already
8 committed to servicing the Cal State Express contract), but he chose not to expand his business in that
9 way. (*Id.*, 202:10-23.)

10 **III. APPLICABLE LAW.**

11 This Court should apply Texas law in interpreting the Agreements and deciding this motion. As
12 noted above, all of Rahawi's claims are premised on the theory that the Agreements misclassified him
13 as an independent contractor. (FAC, ¶ 27.) The Agreements provide that they "shall be interpreted
14 under the laws of the state of Texas." (Rahawi Dep., Ex. 204, § 7.03.)

15 Federal courts apply the choice of law rules of the forum state to determine the substantive law
16 that should be used. *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002) (citing *Klaxon Co. v. Stentor*
17 *Elec. Mfg. Co.*, 313 U.S. 487 (1941)). California courts apply "the principles set forth in Restatement
18 section 187, which reflect a strong public policy favoring enforcement of such provisions." *Nedlloyd*
19 *Lines B.V. v. Super. Ct.*, 3 Cal. 4th 459, 465 (1992). Under this approach, courts first examine whether
20 the chosen state has a substantial relationship to the parties or to the transaction, or whether there is
21 another reasonable basis for the parties' choice of law. *Id.* at 466. "A substantial relationship exists
22 where one of the parties is domiciled or incorporated in the chosen state." *ABF Capital Corp. v. Osley*,
23 414 F.3d 1061, 1065 (9th Cir. 2005) (citing *Nedlloyd Lines B.V.*, 3 Cal.4th at 467). Eagle is domiciled
24 in the state of Texas. (Exs. 203, 204 p. 1.) Thus, there is a reasonable basis for the parties' choice of
25 Texas law.

26 California courts also consider whether the application of another state's law "is contrary to a
27 *fundamental* policy of California." *Nedlloyd Lines B.V.*, 3 Cal.4th at 466 (emphasis in original). The
28

1 threshold issue in the present case is whether Rahawi was properly classified as an independent
2 contractor. California does not have a fundamental public policy regarding the classification of its
3 contractors. *See Mary Kay Inc. v. Woolf*, 146 S.W.3d 813, 817 (Tex. App. 2004) (applying Texas law to
4 decide whether a Mary Kay consultant who worked in California was an independent contractor or an
5 employee, where there was a Texas choice of law clause in the contract). Moreover, Texas law
6 regarding the classification of independent contractors is substantially similar to California law (*see*
7 Section V.B.3 *infra*), and thus application of Texas law cannot be contrary to fundamental California
8 policy. Texas law applies.

9 **IV. SUMMARY OF THE ARGUMENT.**

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

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

21 **V. ARGUMENT.**

22 **A. Standard For Summary Judgment.**

23 Summary judgment is appropriate where "there is no genuine issue as to any material
24 fact and . . . the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby,*
25 *Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)). The moving party is entitled to
26 judgment as a matter of law if the nonmoving party "fails to make a showing sufficient to establish the
27 existence of an element essential to that party's case, and on which that party will bear the burden of
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1 proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). There is no genuine issue unless
2 “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.”
3 *Anderson*, 477 U.S. at 249 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253,
4 288-89 (1968)). “When the material underlying facts are not in dispute and can give rise to only one
5 reasonable conclusion, whether a worker was an employee or an independent contractor is a question
6 of law.” *Texas A & M University v. Bishop*, 156 S.W.3d 580, 584 (Tex. App. 2005) (citing *Indus.*
7 *Indem. Exch. v. Southard*, 160 S.W.2d 905, 906 (Tex. 1942)).

8 As demonstrated below, Rahawi lacks the evidence necessary to prove any of his claims.
9 Accordingly, summary judgment should be granted for Eagle.

10 **B. Summary Judgment Is Mandated Because Rahawi Was An Independent**
11 **Contractor.**

12 All of Rahawi’s claims are premised on the theory that he was misclassified as an
13 independent contractor, rather than as an employee. An independent contractor is one “who, in the
14 pursuit of an independent business, undertakes to do a specific piece of work for other persons, using
15 his own means and methods, without submitting himself to their control in respect to all its details.”
16 *Durbin v. Culbertson County*, 132 S.W.3d 650, 658 (Tex. App. 2004) (citations omitted). Courts
17 generally look to the parties’ agreement in determining the relationship between the parties. *Id.*, at
18 659. Here, the Agreements clearly establish that Rahawi was an independent contractor. Rahawi
19 agreed that he was not an employee of Eagle; he was to provide his own vehicle; he was to control the
20 means, manner and method of making deliveries; he could use his own employees or subcontractors
21 over whom he would exercise exclusive control; he was paid by the job; and his Eagle-derived income
22 was to be reported on a form 1099, with Rahawi solely responsible for the payment of income taxes,
23 among other things. (Ex. 204, §§ I, 2.01, 2.02, 2.05, 2.09, 4.01, 4.09.)

24 Even if this Court looks beyond the Agreements, there can be no doubt that Rahawi was
25 correctly classified as an independent contractor. When looking beyond the parties’ contractual
26 agreement to determine whether an independent contractor is correctly classified, courts will examine
27 which party has the right to control the progress, details, and methods of the operations of the work.

1 *Thompson v. Travelers Indem. Co.*, 789 S.W.2d 277, 278 (Tex. 1990) (citing *Newspapers Inc. v. Love*,
2 380 S.W.2d 582, 585-90 (Tex. 1964)). To measure the right to control, courts consider the following
3 five factors: (1) the independent nature of the contractor's business; (2) the contractor's obligation to
4 furnish necessary tools, supplies, and materials to perform the job; (3) the contractor's right to control
5 the progress of the work except about final results; (4) the time for which the contractor is employed;
6 and (5) the method of payment, whether by unit of time or by the job. *Limestone Prods. Distribution*
7 *Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (citations omitted). As will be shown below, an
8 analysis of these five factors demonstrates that Eagle did not exert a "right to control" over Rahawi and
9 he was properly classified as an independent contractor.

10 **1. The Agreements Establish That Rahawi Was An Independent Contractor.**

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

24 As shown above, the Agreements established an independent contractor relationship between
25 Rahawi and Eagle whereby Rahawi, as owner-operator of a trucking business, performed delivery
26 services for Eagle. (Rahawi Dep., 94:22-95:2; Ex. 203, 204, § I.) The Agreements established Rahawi
27 and Eagle's intention to "create a vendor/vendee relationship between Contractor and [Eagle] through
28

1 which Contractor, as an independent business person, has the potential to realize a profit or loss by:
2 leasing a truck to [Eagle]; rendering certain pick-up and delivery related services....” (*Id.*, Exs. 203,
3 204, § I.) Moreover, the Agreements unambiguously state that “neither contractor nor any of its
4 employees or agents shall be considered to be employees of [Eagle] or of [Eagle] customers at any
5 time under any circumstances for any purpose whatsoever.” (*Id.*) Eagle exercised no right of control
6 over Rahawi; as stated in the contract: “Contractor shall exercise independent discretion and judgment
7 to determine the method, manner and means of performance of its contractual obligation under this
8 Agreement.” (*Id.*, Exs. 203, 204, § I pp. 1-2.) Accordingly, Rahawi was an independent contractor
9 under the Agreements.

10 **2. There Is No Evidence Of Control Outside Of The Agreement Between**
11 **Rahawi And Eagle.**

12 Even if this Court looks outside the Agreements, there is no evidence that Eagle
13 controlled the progress of Rahawi’s work. Before Eagle may be considered Rahawi’s employer,
14 Eagle’s “exercise of control must be so persistent and the acquiescence therein so pronounced as to
15 raise an inference that, when the incident occurred, the parties by implied consent had agreed that the
16 principal had the right to control the details of the work.” *City of Paris v. Floyd*, 150 S.W.3d 224, 227
17 (Tex. App. 2004). “An employer controls not merely the end sought to be accomplished, but also the
18 means and details of its accomplishment.” *Cook v. Nacogdoches Anesthesia Group*, 167 S.W.3d 476,
19 481 (Tex. App. 2005) (citing *Thompson*, 789 S.W.2d at 278 (finding that an anesthesiologist who had
20 discretion in how to conduct his job and was provided equipment by the hospital and not the group he
21 contracted with was an independent contractor, despite the fact that the group told him when to be at
22 the hospital for his anesthesia services)).

23 Addressing a similar situation, the Texas Supreme Court recently concluded that a contract
24 driver was an independent contractor as a matter of law. *Limestone Prods. Distribution Inc.*, 71
25 S.W.3d at 312. In *Limestone*, the court utilized the five factor test described above to determine
26 whether a truck driver was an employee or an independent contractor. *Id.* As here, the contractor
27 owned his own truck, could drive any route he wished, was only required to deliver the load on time,
28

1 had his income reported on a Form 1099, and had to pay his own taxes and expenses. *Id.* at 312-313.

2 The *Limestone* court concluded that the truck driver was an independent contractor:

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

10 [T]he summary-judgment evidence establishes that Limestone merely
11 controlled the end sought to be accomplished - determining where and
12 when to deliver the load - whereas Mathis controlled the means and details
13 of accomplishing the work.

14 *Id.*

15 Indeed, in a case involving virtually the same agreement as that at issue here, the U.S. District
16 Court for the Eastern District of Louisiana just this year applied *Limestone* to hold that an owner-
17 operator under contract with Eagle was properly classified as an independent contractor and not an
18 employee. *Davis*, 2006 WL 2631966, *1 (E.D. La. 2006). The court explained:

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

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

1 The facts here are the same as *Limestone* and *Davis*, and the same analysis applies. Rahawi,
2 like the drivers in those cases, was required to furnish and operate his own truck, the major tool of his
3 trade. (Rahawi Dep., 192:17-193:2.) Rahawi was also responsible for the costs of operating and
4 maintaining his vehicle, including gasoline, repairs and insurance. (*Id.*, Ex. 204, § 2.05; 206:1-9,
5 274:25-275:6, 275:20-276:16.) Rahawi was not guaranteed any amount of work and was free to do
6 business with other companies. (*Id.*, Exs., 203, 204, § I, pp. 1-2; 188:23-189:6.) Rahawi's only
7 compensation was the 60% of the tariff of each shipment he picked up and delivered, and he received
8 no compensation if there was no work. (*Id.*, Ex. 204, § 4.01; 94:4-13.) Rahawi received a Form 1099
9 from Eagle, not a W-2, and he paid his own taxes. (*Id.*, Ex. 204, § 4.09; 246:3-252:10.) Additionally,
10 Rahawi owned two trucks, and hired a subcontractor to drive his second truck and assist him with his
11 trucking business. (*Id.*, 340:21-341:17.) Eagle merely controlled the end sought to be accomplished –
12 delivering freight in accordance with customer specifications – whereas Rahawi controlled the means
13 and details of accomplishing the work.

14 Rahawi contends that Eagle exercised control over him by telling him what time to arrive at the
15 station each day and by requiring him to place an Eagle logo on his truck and to wear an Eagle uniform
16 when making deliveries. But Rahawi's testimony demonstrates that he did not arrive at the station at
17 the same time each day and that some days he did not show up at all. (*Id.*, 160:15-163:12; 157:15-17.)
18 Moreover, Rahawi admitted that the only adverse consequence of not showing up "on time" was that
19 other drivers would take the freight and there would be little or no freight left for him. (*Id.*, 160:15-
20 163:12.) Further, as shown above, federal regulation requires motor carrier identifying information on
21 the leased vehicle. See 49 C.F.R. § 376.11(c)(1) (requiring leased vehicles to be marked with the
22 motor carrier's identifying information); see also *Tamez v. Southwestern Motor Transport, Inc.*, 155
23 S.W.3d 564 (Tex. App. 2004) (requiring driver to comply with federal or state regulations "does not
24 have any impact on the type of relationship that exists between the carrier-lessee and the contractor-
25 lessor"). Examining such requirements in *Davis*, the court held that they did not "create a factual
26 dispute" and were "not at all inconsistent with independent contractor status." *Davis*, 2006 WL
27 2631966, at *3-*4.

1 **3. Rahawi Was An Independent Contractor Under California Law.**

2 Even if California law applied, Rahawi was properly classified as an
3 independent contractor. California law is substantially similar to Texas law regarding classification of
4 independent contractors; under both, a "right to control" test is used to determine whether an
5 independent contractor is properly classified. *Compare Limestone Prods. Distribution Inc.*, 71 S.W.3d
6 at 312 (right to control the progress, details, and methods of the operations of the work) *with Bates v.*
7 *Industrial Accident Comm'n*, 156 Cal.App.2d 713, 718 (1958) (independent contractor relationship
8 will not be considered employment relationship unless the alleged employer has the right "to exercise
9 complete and authoritative control of the mode and manner in which the work is performed.").

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

25 The court considered similar factors in *Bates*, 156 Cal.App.2d at 713, holding that the driver of
26 a catering truck was an independent contractor, not an employee: the driver controlled the day-to-day
27 operation of his route, was obligated to provide insurance and maintenance for his truck, and did not

1 receive an hourly wage. *Id.* at 718-719; *see also Mission Ins. Co. v. Workers Compensation Appeals*
2 *Board*, 123 Cal. App. 3d 211 (1981) (security alarm service provider an independent contractor, not an
3 employee, based on the parties' agreement, the independent nature of the contractor's business, the
4 contractor's obligation to furnish his own vehicle and pay his own expenses, and the method of
5 payment.) Thus, even under California law, Rahawi was properly classified as an independent
6 contractor.

7 **C. All of Rahawi's Claims Fail As A Matter of Law Given That Rahawi Was An**
8 **Independent Contractor.**

9 All of the provisions of the California Labor Code and Wage Order on which Rahawi
10 bases his First, Second, Third and Fourth Causes of Action apply only to employees, not contractors.⁴
11 *See* Cal. Lab. Code §§ 221, 223, 226.7, 400-410, 450, 512, 2802; IWC Wage Order No. 9; FAC ¶ 44,
12 45, 46, 47, 54 & 57. As demonstrated above, Rahawi was an independent contractor, not an employee.
13 Thus, the Labor Code and Wage Order provisions on which he relies do not apply to him, and his First
14 through Fourth Causes of Action fail. And, because Rahawi's Ninth Cause of Action for violation of
15 California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, is wholly based on the
16 violations alleged in his First through Fourth Causes of Action, the Ninth Cause of Action fails with
17 them.

18 **VI. CONCLUSION.**

19 Rahawi's own deposition testimony defeats any claim that he was not properly classified as an
20 independent contractor, and his claims against Eagle fail. No material facts are in dispute, and Eagle is
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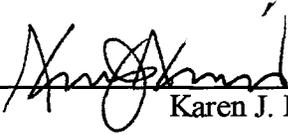
27 ⁴ Rahawi did not join in the Fifth, Sixth, Seventh and Eighth Causes of Action contained in the
28 First Amended Complaint.

1 entitled to judgment as a matter of law. For all the foregoing reasons, Eagle's motion for summary
2 judgment should be granted.

3 Dated: December 8, 2006

Respectfully submitted,

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6 By  _____
7 Karen J. Kubin

8 Attorneys for Defendant
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